Supreme Court, U.S.
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No. 98-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

BELLSOUTH CORPORATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 47 U.S.C. § 274 — which singles out 20 companies alone and by name for a ban on speech and a line of business prohibition of a type this Court has repeatedly concluded constitutes punishment — violates the Bill of Attainder Clause, the separation of powers, and the First Amendment.

PARTIES TO THE PROCEEDING

The parties in the D.C. Circuit were:

BellSouth Corporation.
U S WEST, Inc.
Federal Communications Commission
United States of America
AT&T Corporation
MCI Telecommunications Corporation

The parties before the Federal Communications Commission were:

Alarm Detection Systems, Inc.
Alarm Industry Communications Committee
Alert Holding Group
Ameritech
Association of Directory Publishers
Association of Telemessaging Services International
AT&T Corporation
Atlas Security Service, Inc.
Bell Atlantic Telephone Companies
BellSouth Corporation
Checkpoint Ltd.
Cincinnati Bell Telephone
Commercial Instruments & Alarm Systems, Inc.
Commonwealth Security Systems, Inc.
ElectroSecurity Corporation
Energy Technology Holding Company
George Alarm Company, Inc.
Information Industry Association
MCI Telecommunications Corporation
Merchant's Alarm Systems
Midwest Alarm
Morse Signal Devices

National Security Service
New York State Department of Public Service
Newspaper Association of America
NYNEX Corporation
Pacific Telesis Group
Peak Alarm
People of the State of California/California PUC
Per Mar Security Services
Post Alarm Systems
Rodriguez, Francisco
Safe Systems
Safeguard Alarms, Inc.
SBC Communications, Inc.
SDA Security Systems, Inc.
Security Systems by Hammond, Inc.
Sentry Protective Systems
Smith Alarm Systems
Superior Monitoring Service, Inc.
SVI Systems, Inc.
Time Warner Cable
United States Telephone Association
U S WEST, Inc.
Valley Burglar & Fire Alarm Co., Inc.
Vector Security
Voice-Tel

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, petitioner BellSouth Corporation states that it has no parent companies. Its wholly owned subsidiaries have issued debt securities to the public as obligations of BellSouth Telecommunications, Inc., Southern Bell Telephone and Telegraph Company, South Central Bell Telephone Company, BellSouth Capital Funding Corporation, BellSouth Savings and Security ESOP Trust, and BellSouth Savings and Employee Stock Ownership Trust. BellSouth Corporation's non-wholly owned subsidiaries are 1155 Peachtree Associates, InfoVentures of Atlanta, Beijing Ji Tong — BellSouth Communication & Information Engineering Co., Ltd., Compania de Radiocommunicaciones Moviles, S.A., Telcel Celular C.A., Tele 2000, S.A., RAM Mobile Data Belgium, S.C.S., RAM Mobile Data, C.V., RAM Mobile Data Limited, BellSouth Carolinas PCS, L.P. (d/b/a BellSouth Mobility DCS), Bloomington Cellular Telephone Company, Chattanooga MSA Limited Partnership, Decatur RSA Limited Partnership, Florida RSA #2B (Indian River) Limited Partnership, Georgia RSA No. 1 Limited Partnership, Georgia RSA No. 2 Limited Partnership, Georgia RSA No. 3 Limited Partnership, Gulf Coast Cellular Telephone Company, Huntsville MSA Limited Partnership, Lafayette MSA Limited Partnership, Los Angeles Cellular Telephone Company, Louisiana RSA No. 7 Cellular General Partnership, MCTA, Muncie Cellular Telephone Company, Inc., Orlando SMSA Limited Partnership, Richmond Cellular Telephone Company, and Terre-Haute Cellular Telephone Company, Inc.

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PETITION FOR A WRIT OF CERTIORARI

BellSouth Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the D.C. Circuit in this case.

OPINIONS BELOW

The decision of the Court of Appeals (App. 1a-32a)[1] is reported at 144 F.3d 58. The First Report and Order of the Federal Communications Commission (App. 33a-190a) is reported at 12 FCC Rcd 5361.

JURISDICTION

The Court of Appeals' decision was issued on May 15, 1998. On October 20, 1998, the Court of Appeals denied the petitions for rehearing and suggestions for rehearing en banc. App. 191a-194a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Bill of Attainder Clause (Art. I, § 9, cl. 3) of the United States Constitution provides: "No Bill of Attainder or ex post facto Law shall be passed."

The First Amendment to the Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press."

The statute at issue here, 47 U.S.C. § 274, is reproduced at App. 195a-203a.

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[1] References to the Appendix to the Petition for Writ of Certiorari are styled "App. _."

STATEMENT OF THE CASE

This case is related to *SBC Communications Inc. v. FCC*, No. 98-652, now pending on certiorari. This case involves a constitutional challenge to Section 274 of the Communications Act, as amended, 47 U.S.C. § 274, which is one of the five "Special Provisions Concerning Bell Operating Companies" (47 U.S.C. §§ 271-275), passed as part of the Telecommunications Act of 1996. The petition in No. 98-652 presents a constitutional challenge to *all* of the Special Provisions.

The Special Provisions, including Section 274, are unprecedented in our Nation's history. Rather than following the usual legislative practice of setting forth generally applicable regulatory criteria, the Special Provisions single out 20 Bell Operating Companies ("BOCs") by name and prohibit that closed class of companies — and no other entities — from engaging in otherwise lawful lines of business.

Section 274 in particular involves not merely a lawful line of business, but *constitutionally protected* activity: speech and publishing. Section 274 expressly prohibits the BOCs, and them alone, from directly publishing by electronic means "news," "editorials," "literary materials," and other types of information.

This Court has held that "[o]ur country's own experience with bills of attainder" has given rise to the principle that "a legislative enactment barring designated individuals or groups from participation in specified employments or vocations" is "impermissible." *Nixon v. Administrator of General Servs.*, 433 U.S. 425, 474 (1977); *see also Selective Service System v. Minnesota PIRG*, 468 U.S. 841, 852 (1984) (the list of legislative punishments forbidden by the bill of attainder clause includes "legislative bars to participation by individuals or groups in specific employments or professions").

Yet a divided D.C. Circuit, over a lengthy dissent by Judge Sentelle, has held that Section 274 is constitutional. This Court's review is therefore urgently needed. This petition should be held in abeyance pending the decision on certiorari in No. 98-652; if

certiorari is not granted in No. 98-652, then it should be granted in this case.

A. Regulatory Background

In 1974, the United States brought an antitrust suit against AT&T, alleging that it had sought to monopolize long-distance telephone services and telecommunications equipment manufacturing. Complaint, *United States v. AT&T*, No. 74-1698 (D.D.C. filed Nov. 20, 1974). The theory of the government's case was that AT&T had used its strategic bottleneck control over local telephone facilities to suppress competition in long-distance service and related markets, which were dependent upon access to the local exchange to originate and terminate calls. *United States v. AT&T*, 552 F. Supp. 131, 161-62 (D.D.C. 1982), *aff'd sub nom., Maryland v. United States*, 460 U.S. 1001 (1983).

In 1982, after the government had put on its case in chief, but before AT&T had presented any evidence in its defense, the parties agreed to settle the litigation through the entry of a consent decree. The district court approved the decree with modifications and entered an order called (in the Telecommunications Act of 1996) the AT&T Consent Decree.

The AT&T Consent Decree required AT&T to divest itself of the 20 Bell Operating Companies ("BOCs") named in the Telecommunications Act of 1996.[2] These 20 local telephone companies — none of which had been named as defendants by the government in the antitrust suit — were grouped into seven unaffiliated companies known as Regional Bell Operating Companies ("RBOCs") and divested effective January 1, 1984. The RBOCs include petitioner BellSouth. Under the AT&T Consent Decree, the BOCs were prohibited from engaging in certain lines of business, such as long distance service,

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[2] AT&T also divested its interest in Cincinnati Bell Telephone Company and the Southern New England Telephone Company ("SNET"), neither of which was defined as a BOC in the 1996 Act. *See* 47 U.S.C. § 153(4).

telecommunications equipment manufacturing, and information services (such as electronic publishing). *United States v. AT&T*, 552 F. Supp. at 227-28.

In reviewing and ultimately approving the AT&T Consent Decree, "the District Court made no explicit findings of liability." *United States v. Western Elec. Co.*, 900 F.2d 283, 289 (D.C. Cir.) (*per curiam*), *cert. denied*, 498 U.S. 911 (1990). In fact, the district court noted that "[i]t would be inappropriate for the Court at this juncture to draw definitive conclusions with regard either to the sufficiency of the evidence to sustain a finding of liability or to the validity of AT&T's various legal and factual defenses. . . . [I]ndeed, not all the evidence that may bear on the issues has yet been adduced." *United States v. AT&T*, 552 F. Supp. at 161. The district court later remarked, "[Y]ou can't say there was an evidentiary background of misconduct when the Court never found misconduct. The settlement occurred before the trial was over." Tr. Oral Arg. at 22-23, *United States v. GTE Corp.*, No. 83-1298 (D.D.C. Nov. 22, 1983).

In particular, the district court made no findings of anticompetitive conduct with respect to the information services restriction. "The Government's case in the *AT&T* antitrust litigation centered exclusively on AT&T's activities in the interexchange-service and equipment-manufacturing markets"; there were no allegations, or evidence presented, of anticompetitive activity in electronic publishing or the provision of news, entertainment, or other information to local subscribers over the telephone network. *Western Elec. Co.*, 900 F.2d at 307.

The AT&T Consent Decree was never intended to be permanent. The district court recognized that the line of business restrictions imposed on the BOCs were themselves anticompetitive insofar as they "limit[ed] competition by preventing the entry of a viable competitor" and that the need for line-of-business limits on the BOCs "w[ould] disappear." *United*

States v. AT&T, 552 F. Supp. at 194-95 & n.264.[3]

The district court accepted the undertaking of the Department of Justice ("DOJ") "to report to the Court every three years concerning the continuing need for the [line of business] restrictions imposed by the decree." 552 F. Supp. at 195. In 1987, DOJ recommended that the information services restriction be lifted. DOJ explained that the risks of anticompetitive conduct by the BOCs were slight. "In the five years since the decree was entered, the relationship between information services and the local exchange has diverged in important respects from the traditional bottleneck relationship anticipated at the time the decree was entered." Report and Recommendations of the United States, filed Feb. 2, 1987 (*1987 Report*), at 126-27. DOJ noted the large size of many competitors and the increasing globalization of the information-services market and concluded that there was no realistic prospect that the BOCs would obtain market power if allowed to enter the information-services market. *Id.* at 112-13, 122. A DOJ-commissioned study documented the many economic, technical, and regulatory barriers to BOC market power. *See* Peter W. Huber, THE GEODESIC NETWORK: 1987 REPORT ON COMPETITION IN THE TELEPHONE MARKET 6.17 to 6.24, 6.30 to 6.33, 6.35, 6.40, 6.48 n.133, 6.51, 7.15 (Jan. 1987).

In addition, DOJ concluded that "[c]onsumers have been deprived of some services already, and the potential that efficiency will be sacrificed or that services made possible by new technical developments will be unavailable to BOC customers is likely to be even greater in the future." *1987 Report*, at 154. Counsel for AT&T told the district court that the conditions prevailing in the information-services market in 1987 were "unforeseen" when the decree was entered and were

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[3] AT&T's counsel told the district court: "I'm against restrictions. I'll be happy if nobody is restricted on anything. After the divestiture occurs, let [the BOCs] do what they want." Tr. Oral Arg. at 25,211, *United States v. Western Elec. Co.*, No. 82-0192 (D.D.C. June 29, 1982).

"contrary to what was represented" to the district court in 1982 and "contrary to what [the court] assumed." Tr. Oral Arg. at 319, *United States v. Western Elec. Co.*, No. 82-0192 (D.D.C. July 1, 1987).

DOJ, joined by the BOCs, moved the district court to eliminate the information-services restriction from the decree. This motion was unopposed by any party to the decree. 900 F.2d at 292 & n.7, 305 & n.27. It was powerfully supported by the Federal Communications Commission (FCC); by the National Telecommunications and Information Administration (NTIA) of the Department of Commerce; by such notable economists as Professors Jerry Hausman and Franklin Fisher, both of MIT, and Nobel laureates Kenneth Arrow and George Stigler; by Alfred Kahn, the nation's premier expert on regulated markets; by the National Association of Regulatory Commissioners (NARUC) and numerous state commissions, including those of California, Florida, Illinois, Michigan, Pennsylvania, Vermont, Virginia, West Virginia, and Wisconsin; and by a wide array of public interest and consumer groups.[4]

In 1991, the district court accepted the Department's recommendation and discontinued the information services restriction. *See United States v. Western Elec. Co.*, 767 F. Supp. 308, 327 (D.D.C. 1991). The D.C. Circuit affirmed that

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[4] This coalition included: Action for Children's Television; American Council for the Blind; Black Citizens for a Fair Media and the Council of Churches of the City of New York; Church Federation of Greater Chicago, Office of Communications; Citizens for a Sound Economy Foundation; Consumer Interest Research Institute; Consumer Research Foundation; Council of Chief State School Officers; the Media Institute; National Association for Better Broadcasting; National Association for the Advancement of Colored People; National Association of the Deaf; National Association of Silver Haired Legislators; National Indian Youth Council, Inc., and the Native American Broadcasting Consortium; National School Boards Association; National School Public Relations Association; Northeast Independent Living Program; Public Service Satellite Consortium; Telecommunications for the Deaf, Inc.; and World Institute on Disability, Inc.

decision, endorsing the Government's determinations (1) "that there was no substantial risk that removal of the [information services] ban would lessen competition"; (2) that "regulation would play a substantial role in minimizing any anticompetitive risks"; and (3) "that removal of the ban would benefit consumers by enhancing competition in information services." *United States v. Western Electric Co.*, 993 F.2d 1572, 1578 (D.C. Cir.), *cert. denied*, 510 U.S. 985 (1993). In fact, the Court of Appeals opined that any findings that "contradict[ed]" DOJ's conclusion would have been "clearly erroneous." *Id.*

Following the passage of the Telecommunications Act of 1996,[5] the remainder of the AT&T Consent Decree was vacated by the district court. *See United States v. Western Elec. Co.*, No. 82-0192, 1996-1 Trade Cas. (CCH) ¶ 71,364 (D.D.C. Apr. 11, 1996). No party appealed, and the elimination of the AT&T Consent Decree is now final.

B. The Telecommunications Act of 1996

On February 8, 1996, President Clinton signed into law the Telecommunications Act of 1996. One of the prime objectives of the Act was to create competition in local telephone markets. In Part II of Title II of the Communications Act of 1934 ("Communications Act"), as amended, entitled "Development of Competitive Markets," 47 U.S.C. §§ 251-261, Congress mandated the opening of local exchange facilities to competitors; preempted state and local regulations having the effect of prohibiting competitors from entering local exchange markets; and required all incumbent local exchange carriers ("LECs") in the United States (including, but of course not limited to, BellSouth) to assist competitive entry into local markets. Incumbent LECs must (1) allow competitors to "interconnect"

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[5] *See* Telecommunications Act of 1996, P.L. 104-104, Title VI, § 601(a)(1), 110 Stat. 143.

with the LECs' network, (2) sell competitors access to "network elements" "on an unbundled basis" — that is, allow competitors to supplement their own facilities by purchasing unbundled pieces of the LECs' call routing and delivery network; and (3) sell competitors the LECs' retail telephone services at wholesale prices so that the competitors can resell those services to their own customers. § 251(c)(2), (3), (4).[6]

The FCC has explained that these provisions, in "requiring businesses . . . to share their market" with their competitors, are an "unusual, arguably unprecedented act by Congress."[7] As onerous as these provisions are, they are not challenged here.

Rather, this case involves Section 274, one of the "Special Provisions Concerning Bell Operating Companies." In adopting the "Special Provisions," Congress departed from the Act's basic structure of imposing obligations on all qualifying local exchange carriers. Instead, Congress crafted these provisions to single out BellSouth, and other BOCs, *alone and by name*, for a special burden, not applicable to any other incumbent local exchange carrier.

The Special Provisions include new Section 271, which prohibits the BOCs by name from offering long distance services where they offer local exchange service, unless and until the FCC grants approval subject to a list of statutory criteria.[8] In

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[6] The FCC's implementation of these provisions is before this Court in *AT&T Corp. v. Iowa Utilities Bd.*, No. 97-826.

[7] *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Service in Michigan*, Mem. Op. & Order, CC Docket No. 97-137, FCC 97-298, at 12 ¶ 18 (released Aug. 19, 1997).

[8] The FCC is given this veto power even though the generic provisions of the 1996 Act (47 U.S.C. §§ 251-53) deprive each BOC of its state-protected local franchise monopoly that was the rationale for the AT&T Decree. In fact, the Decree provided that the BOCs could obtain long-distance relief even when they still retained "monopoly power," and even over the FCC's objection.

more than 2 and 1/2 years, the FCC has refused to grant any such approvals. And even if it were ultimately to grant relief to a BOC in a particular State, Section 271(d)(6) contains a permanent special disability permitting the FCC to withdraw long distance authority at any time.

The Special Provisions also include new Section 273, which prohibits the named companies from manufacturing and providing telecommunications equipment for as long as they are prohibited from providing long distance services in their own regions, and new Section 275, which bars BOCs (other than Ameritech) and their affiliates from engaging in alarm monitoring services for a period of five years.

At issue in this case is Section 274, which bans the BOCs by name from themselves engaging in certain important kinds of speech. Under that provision, a named company may not, for four years, engage in "electronic publishing" by means of its basic telephone service. 47 U.S.C. § 274. "Electronic publishing" is defined as the dissemination, provision, publication, or sale of "news (including sports); entertainment (other than interactive games); business, financial, legal, consumer, or credit materials; editorials, columns, or features; advertising; photos or images; archival or research material; legal notices or public records; scientific, educational, instructional, technical, professional, trade, or other literary materials; or other like or similar information." § 274(h)(1).

Neither a BOC, its officers, directors or employees, nor any company owned or controlled by a BOC may participate directly in publishing in any way. § 274(b)(5)(A); § 274(i)(9).

A separated affiliate or electronic publishing joint venture may engage in electronic publishing, so long as it is "operated independently from the Bell operating company." § 274(b). The requirements of separation include but go far beyond maintaining separate books and records, preparing separate financial statements, and dealing with affiliated entities on an arms' length, nondiscriminatory basis pursuant to written contract or tariff. Under Section 274, a separated affiliate or electronic

publishing joint venture must adhere to a host of structural separation rules and joint marketing restrictions:

- A separated affiliate, by definition, may not own or control a BOC or be owned or controlled by a BOC, § 274(i)(9), (10);
- A separated affiliate may not have any officers, directors, employees, or property in common with the BOC, § 274(b)(5);
- A separated affiliate or joint venture may not "incur debt in a manner that would permit a creditor of the separated affiliate or joint venture upon default to have recourse to the assets of the Bell operating company," § 274(b)(2);
- A separated affiliate or joint venture may not use the BOC's name or trademark for marketing purposes, § 274(b)(6);
- A separated affiliate may not permit a BOC to hire or train its personnel, purchase, install, or maintain equipment, or perform research and development on its behalf, § 274(b)(7); and
- A separated affiliate or joint venture may not engage in joint marketing activities with a BOC, except in very limited circumstances, § 274(c).

If engaged in an electronic publishing joint venture, the BOC may not have more than 50% equity or control, or rights to more than 50% of the revenues. § 274(c)(2)(C).

Violation of Section 274 renders a Bell operating company subject to the criminal penalty and civil forfeiture provisions of the Communications Act of 1934. 47 U.S.C. §§ 501-503. In addition, Section 274 creates a private right of action (enforceable through damages and cease and desist orders) against the BOCs. *Id.* at § 274(e).

C. The FCC's *Order*

In the *Order* at issue here, the FCC implemented the non-accounting requirements of Section 274. The Commission

recognized that BellSouth and others had raised "constitutional concerns with respect to [its] implementation" of Section 274, including First Amendment and Bill of Attainder objections. *Order*, ¶ 35 (App. 52a). Nonetheless, the Commission held that those arguments were "without merit." *Id.* at ¶ 37 (App. 54a). Following the *Order's* issuance, BellSouth filed a timely petition for review in the D.C. Circuit.

D. The Court of Appeals' Decision

A divided Court of Appeals denied the petition for review. The majority began by acknowledging that the Bill of Attainder Clause is "triggered when a legislative act meets two tests — first, that it apply with specificity, and second, that it impose punishment." App. 7a. The majority did not dispute that Section 274 singles out the BOCs by name and therefore meets the specificity requirement. Nor did the majority dispute that "the [Supreme] Court's four major decisions invalidating statutes on Bill of Attainder grounds have all involved legislation preventing specific classes of persons from pursuing certain occupations." *Id.* at 11a (citing *United States v. Brown*, 381 U.S. 437, 448-49 (1965); *United States v. Lovett*, 328 U.S. 303, 315-16 (1946); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 377 (1867); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 320 (1867)).

Nonetheless, the majority held that Section 274 does not impose "punishment" within the meaning of the Bill of Attainder doctrine. In the majority's view, the statutory restriction on electronic publishing is unremarkable "*apart from its specific targeting aspect.*" App. 14a (emphasis added). "[T]he section is nothing more than a line-of-business restriction, comparable for example to the Glass-Steagall Act's limitation on the entry of commercial banks into investment banking, 12 U.S.C. §§ 24 (Seventh), 78, or to the cross-ownership restrictions on broadcasters upheld in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978)." App. 12a. The Court of Appeals insisted that Section 274 is not a bar on electronic

publishing because it leaves a separated affiliate in the BellSouth family free to speak "as long as it [i]s kept separate from [the BOC] in the ways prescribed by § 274(b)." *Id.* at 13a.

The Court of Appeals further held that Section 274 was not a bill of attainder because the court was able, after the fact, to imagine a supposedly rational distinction between the 20 BOCs and the more than 1,300 other local telephone companies in the United States. "Thus the distinction drawn by Congress seems quite understandable without resort to inferences of punitive purpose." App. 17a.

With respect to the First Amendment, the D.C. Circuit held that Section 274 — which on its face is speaker-specific — is subject to mere intermediate scrutiny because "there is no indication that § 274's coverage was limited to the BOCs because of any concern about the content of their speech." App. 21a. The Court of Appeals further held that Section 274 is content-neutral, even though it acknowledged that "§ 274 defines the field of expression to which it applies by reference to a set of categories that might in a formal sense be described as content-based. Thus it covers items such as 'news,' 'entertainment,' and 'research material,' and exempts information such as 'video programming,' 'voice messaging,' and 'data processing.'" *Id.* Despite the facially content-based nature of the statute, the D.C. Circuit held that strict scrutiny was not appropriate because "[n]othing about the provision . . . suggests an underlying purpose to favor or disfavor particular viewpoints." *Id.*

The Court held that intermediate scrutiny was satisfied because "[i]t is at least plausible that structural separation will more effectively meet the perceived anticompetitive threat than would lesser restrictions." App. 23a.

Judge Sentelle dissented with respect to the Bill of Attainder Clause. He began by observing that "Section 274 exhibits nearly unprecedented specificity, forbidding twenty named corporations, alone out of over 1,300 local exchange carriers, from entering a trade or business on the same terms as others. Of

all the bill of attainder cases decided by the Supreme Court, in only one did a statute single out individuals by name, and that was deemed an unconstitutional bill of attainder." App. 26a (citing *Lovett*, 328 U.S. 303). "[G]iven the history of treating line-of-business restrictions as punishment," "we probably need to go no further." *Id.* at 29a.

Judge Sentelle explained that a Bill of Attainder analysis that evaluates such limitations "apart from [their] specific targeting aspect" was fundamentally misguided. App. 29a. "The statute does not address the characteristics of local exchange carriers that create risks of anticompetitive behavior. If it did, it would speak of those characteristics, which might well be shared by, for example, GTE or Sprint." *Id.* at 29a-30a. "Then, whether or not a particular carrier possessed the relevant characteristics and therefore should be restricted would be subject to judicial determination." *Id.* at 30a.

Judge Sentelle stressed that Congress had acted impermissibly by "defin[ing] the burdened class by name rather than by characteristic or future action." App. 31a. Section 274 therefore "partakes of [a] . . . violation of separation of powers safeguards." *Id.* "It is one thing for the legislature to attempt to protect competition by defining a standard against which the conduct of individuals can be measured. It is quite another for it to simply list the names of individuals who Congress perceives as having uncontrollable monopolistic tendencies." *Id.* at 31a-32a. "This short-circuits the factfinding and due process protections of trial in an Article III court, and therefore runs afoul of the structural provisions embodied in the Constitution's Bill of Attainder Clause." *Id.* at 32a.

Petitioner BellSouth and intervenor U S WEST, Inc. filed petitions for rehearing and suggestions for rehearing en banc. The Court directed the Government to submit a response to U S WEST's filing. On October 20, 1998, the Court denied the petitions for rehearing and suggestions for rehearing en banc, with Judge Sentelle indicating that he would have granted the petitions for rehearing and BellSouth's suggestion for rehearing

en banc. App. 191a-194a.

REASONS FOR GRANTING THE WRIT

This case involves an unprecedented targeted ban on an otherwise lawful (indeed, constitutionally protected) line of business. The unprecedented nature of the statute is itself powerful evidence of its constitutional flaw. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 230 (1995) ("That prolonged reticence would be amazing if such interference were not understood to be constitutionally proscribed.").

The D.C. Circuit's decision, if permitted to stand, would set a dangerous blueprint for the evisceration of fundamental constitutional guarantees. Under the Court of Appeals' decision, Congress may single out particularly disfavored companies, groups, or individuals in any field of endeavor and subject those entities, and no others, to legislative abuse so long as the same rules *could have been* applied across-the-board to all similarly situated parties. For example, Congress could legislatively determine that a particular defense contractor or software company has a unique propensity to engage in anticompetitive or otherwise illegal conduct and so bar that company alone from engaging in a certain line of business. According to the D.C. Circuit, the victim would be subject to that disability without ever appearing before an Article III court and without receiving any due process.

The need for this Court's review is heightened by a subsequent D.C. Circuit opinion applying the court of appeals' decision in this case to reject a bill of attainder and separation of powers challenge to § 271 of the Special Provisions. *See BellSouth Corp. v. FCC*, No. 98-1019 (D. C. Cir. Dec. 22, 1998).

This Court has never upheld a statute disqualifying certain named persons from the pursuit of a lawful line of business. Two centuries into our Nation's history, the legislative process should not be transformed to permit such a result.

A. Section 274 Violates the Bill of Attainder Clause and The Separation of Powers.

1. A statute is an impermissible bill of attainder if it (1) "singles out" particular parties and (2) imposes a "punishment" on those parties without a judicial trial. *Selective Service System*, 468 U.S. at 846-47. The Court of Appeals did not deny that the specificity requirement is met here. It is also plain that Section 274 imposes "punishment."

In describing the "punitive" measures that the Bill of Attainder Clause prohibits, this Court has identified a historical "checklist of deprivations and disabilities" that the Clause "unquestionably" has been understood to forbid. *Nixon*, 433 U.S. at 473. In composing this checklist, this Court has been careful not to limit the concept of "punishment" to the classic sentences of death, punitive fines, "imprisonment, banishment, and the punitive confiscation of property by the sovereign." *Nixon*, 433 U.S. at 474. Rather, this Court has explained that "[o]ur country's own experience with bills of attainder resulted in the addition of another sanction to the list of impermissible legislative punishments: a legislative enactment barring designated individuals or groups from participation in specified employments or vocations." *Id.*; *see also Selective Service System v. Minnesota PIRG*, 468 U.S. at 852.

In fact, since the ratification of the Constitution, laws selectively barring particular parties from pursuing otherwise lawful lines of business or commercial endeavors have been the most common variety of unconstitutional bills of attainder. *See United States v. Brown*, 381 U.S. at 448-49 (law barring Communist Party members from serving as officers or nonclerical employees of labor unions); *United States v. Lovett*, 328 U.S. at 314-17 (law preventing three named individuals from being paid for government employment); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 377 (1867) ("exclusion from any of the professions or any of the ordinary avocations in life for past conduct can be regarded in no other light than as punishment for

such conduct. . . . *All* enactments of this kind . . . are subject to the constitutional inhibition against the passage of bills of attainder.") (emphasis added); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 320 (1867) (law barring those who had served with the Confederacy from working as, *inter alia*, priests is bill of attainder because "[d]isqualification from the pursuits of a lawful avocation" constitutes punishment).

2. The D.C. Circuit's decision upholding Section 274 sets a dangerous precedent that warrants plenary review by this Court. The Court of Appeals replaced the bright-line, "checklist" approach heretofore employed by this Court with a free-form judicial inquiry into how burdensome a restriction is on "investors with stakes in the [company]" and into whether "the distinction drawn by Congress seems . . . understandable without resort to inferences of punitive purpose." App. 13a, 17a. In a subsequent decision upholding § 271 against constitutional challenge, the D.C. Circuit adhered to this misguided mode of analysis, thereby underscoring the need for this Court's review. *See BellSouth Corp. v. FCC*, No. 98-1019 (D. C. Cir. Dec. 22, 1998).

The Court of Appeals held in the case at bar that the "most important" question was whether Section 274 could "reasonably be said to further nonpunitive legislative purposes." App. 13a. The D.C. Circuit opined that even a law targeting specific persons for a line-of-business restriction will not constitute punishment so long as a reviewing court can hypothesize a legitimate regulatory purpose. The test, according to the court, is whether "Congress [can] rationally be said to have pursued nonpunitive purposes in enacting § 274." App. 15a.

This holding effectively equates the structural protections of the Bill of Attainder Clause with the relaxed substantive constraints of rational basis review. Yet this Court has taught that the Bill of Attainder Clause "was not intended to serve as a variant of the equal protection doctrine." *Nixon*, 433 U.S. at 471. The Bill of Attainder Clause "was intended not as a narrow,

technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply — trial by legislature." *Brown*, 381 U.S. at 442.

This fundamental structural guarantee should not be watered down into an impressionistic judicial assessment of "punitive purpose." Regulatory purposes analogous to those put forward by the Government here can be articulated in virtually any bill of attainder case. Indeed, the more extensive the trial by legislature, the more "rational" and "narrowly tailored" the resulting product will appear to be. In *Brown*, for example, this Court explained that "[t]he Solicitor General argues that [the statute] is not a bill of attainder because the prohibition it imposes does not constitute 'punishment.' . . . [H]e urges that the statute was enacted for preventive rather than retributive reasons — that its aim is not to punish Communists for what they have done in the past, but rather to keep them from positions where they will in the future be able to bring about undesirable events." 381 U.S. at 456-57. This Court responded that "it still clearly appears that [the law] inflicts 'punishment' within the meaning of the Bill of Attainder Clause. It would be archaic to limit the definition of 'punishment' to 'retribution.' Punishment serves several purposes; retributive, rehabilitative, deterrent — and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment." *Id.* at 458. "[P]unishment is not restricted purely to retribution for past events, but may include inflicting deprivations on some blameworthy or tainted individual in order to prevent his future misconduct." *Nixon*, 433 U.S. at 476 n.40.

Accordingly, this Court has never held that a form of punishment falling within the "checklist of deprivations and disabilities" that includes line-of-business limitations (*Nixon*, 433 U.S. at 473-74; *Selective Service System*, 468 U.S. at 852), could be salvaged by a finding that the statute serves a legitimate

regulatory end. Instead, this Court has indicated that "[a] statutory enactment that imposes any of those [checklist] sanctions on named or identifiable individuals would be immediately constitutionally suspect." *Nixon*, 433 U.S. at 473. In both *Nixon* and *Selective Service System*, this Court did not even inquire into "whether the challenged statute [could] be reasonably said to further nonpunitive goals" (*Selective Service System*, 468 U.S. at 854) until it determined that the disabilities imposed by the challenged statute were not among the "forbidden deprivations" contained in the historical checklist. *Nixon*, 433 U.S. at 475.

Thus, in *Nixon*, the statute at issue did not restrict the personal or economic freedom of President Nixon the man. It merely targeted certain papers and tape recordings — specific items of property — for what amounted to a temporary taking, subject to later just compensation. This was no "punishment" at all. *See* 433 U.S. at 475 (provision for "'just compensation' ... undercut[ ] even a colorable contention that the Government has punitively confiscated appellant's property"). Had the statute purported to ban the former President by name from the practice of law, or from public employment, there can be little question that it would have been invalidated as a bill of attainder — even if it had been convincingly defended with a forward-looking regulatory rationale.

3. It would have been bad enough if Congress had attempted to find a supposedly reasonable regulatory distinction between the named BOCs and other local telephone companies, for "the Constitution forbids Congress from making such determinations." *Brown*, 381 U.S. at 450 n.24; *see also id.* at 449 n.23 ("We think it clear from the *Lovett* opinion that § 304 would have been voided even if it could have been demonstrated that no one other than Lovett, Watson, and Dodd possessed the characteristics that Congress was trying to reach."); *McFarland v. American Sugar Ref. Co.*, 241 U.S. 79, 86 (1916) (Holmes, J.) ("it is not within the province of a legislature to declare

[someone] presumably guilty of a crime"). The Bill of Attainder Clause prohibits trial by legislature, even if Congress reaches the "correct" verdict.

But here, Congress did not even purport to make any such finding to support its alleged "regulatory" purpose. Instead, the D.C. Circuit substituted its own imagined rationale for Section 274. The Court of Appeals asserted that the BOCs "can exercise bottleneck control over both ends of a telephone call in a higher fraction of cases than can GTE." App. 17a. This is a perfect example of the hazards of such judicial hypothesizing, for the FCC itself has repeatedly rejected the D.C. Circuit's "both ends" conjecture about the BOCs and GTE in various contexts.[9] Further, the FCC has explained that a dispersed customer base (which the Court of Appeals maintained is typical of non-BOCs) calls for *more* regulation, not less. Dispersed markets are subject to less local service competition and present a *greater* risk of anticompetitive conduct. *Application of ONA and Nondiscrimination Safeguards to GTE*, 9 FCC Rcd 4922 at ¶¶ 6-21 & n.56 (1994).

In any event, the FCC has observed that GTE controls "major urban areas" and "large geographically contiguous regions" that "resemble BOC service areas," including Dallas, Tampa, half of Los Angeles, and all of Hawaii.[10] GTE itself acknowledges that it is "the only major local telephone company" with "multiregional territories stretching across the country." It serves 29 states that include one-third of the U.S. population.[11] GTE's telephone network is no more rural or dispersed than U S

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[9] *See Access Charge Reform Order*, 12 FCC Rcd 15982, 16101-02 (1997); *Applications of NYNEX and Bell Atlantic*, 12 FCC Rcd 19985, ¶¶ 118-20 (1997) (merger approved); *Applications of Pacific Telesis and SBC Communications*, 12 FCC Rcd 2624, 2648-49 (1997) (same).

[10] *Application of ONA and Nondiscrimination Safeguards to GTE*, 9 FCC Rcd 4922 at ¶ 19 (1994).

[11] Chairman's Message, 1996 GTE Annual Report, available at http://www.gte.com/g/annual1996.

WEST's.[12] And GTE is not alone. SNET, which is not subject to Section 274, controls 99% of Connecticut. Nevada Bell, which *is* subject to Section 274, serves only 27% of Nevada; Sprint (which is not subject to Section 274) serves Las Vegas.

4. Equally troubling is the D.C. Circuit's holding that Section 274 can be analyzed "apart from its specific targeting aspect." App. 14a. Yet the "targeting aspect" — the singling out of a closed class that no one can ever leave or join — makes all the difference. If the Glass-Steagall Act, 12 U.S.C. §§ 24 (Seventh), 78, were not a generally applicable law but instead banned Citicorp and Chase Manhattan by name from the securities business, it would be a bill of attainder. Conversely, in *United States v. Lovett*, 328 U.S. 303 (1946), the statute would not have been an attainder had it been more general — if, for instance, it had permanently eliminated the whole agency, and all employees had forever lost the opportunity to work there. Yet the effect on the "*Lovett* three" would have been precisely the same.

If the D.C. Circuit's holding is permitted to stand, the legislature will be able to single out specific persons by name for specific line-of-business restrictions, or financial penalties in the guise of taxes, or any other disability, so long as such measures would be permissible if (hypothetically) they were expanded to be generally applicable laws. Such an approach would eviscerate

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[12] U S WEST has 15,270,282 access lines spread over 283,799 square miles, for an average of 53.8 lines per square mile. GTE has 17,310,630 access lines spread over 359,682 square miles, for an average of 48.12 lines per square mile. *See* Response by U S WEST Communications, Inc. to FCC Universal Data Request, DA 97-1433, CC Docket No. 96-45, at Questions 1, 19 (submitted Sept. 12, 1997); Response by GTE Corp. to FCC Universal Service Data Request, DA 97-1433, CC Docket No. 96-45, at Questions 1, 19 (submitted Sept. 12, 1997). Both the GTE and U S WEST responses are available on the FCC's World Wide Web home page: http://www.fcc.gov/Bureaus/CommonCarrier/Comments/da971433_data_request/datareq.html.

the Bill of Attainder Clause.

5. The D.C. Circuit held that Section 274 cannot be a bill of attainder because it is (supposedly) "only" a structural separation rule. App. 13a. But Section 274 is a complete prohibition on a BOC's (or its affiliates') provision of electronic publishing via its telephone network in its local service area, except through an entity completely outside the BOC's control, such as a wholly separated subsidiary. The BOC and its affiliates may not provide such services at all. Whether another member of the BellSouth corporate family (outside of the BOC's control) may engage in similar communication, "[i]t hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987) (internal quotations omitted). That principle is particularly salient here because there is no assurance that substitute speech by a different entity would reach the same listeners as the expression in which the BOC wishes to engage. Audiences are not fungible.

According to the Court of Appeals' logic, the statutes struck down in *Lovett* and *Garland* could have been upheld so long as they permitted some member of the same family to work for the government or to practice as a lawyer in federal court. Whether they amounted to punishment would turn on a court's assessment of how burdensome the statute's effect was on the family as a whole.

The D.C. Circuit's reasoning is no more persuasive in the corporate context. While the court inquired as to whether the statute "leaves all the investors with stakes in the BOCs (i.e., the shareholders of the RBOCs) free to pursue their collective electronic publishing ends, and to aggregate their capital to achieve those ends," App. 13a, it is hornbook law that "[a] corporation and its stockholders are generally to be treated as separate entities." *Burnet v. Clark*, 287 U.S. 410, 415 (1932). This Court has never permitted the corporate forms of such separate entities to be disregarded as blithely as the D.C. Circuit

attempted to do — especially where, as here, one corporate affiliate is completely outside the control of another. *E.g.*, *United States v. Bestfoods*, 118 S. Ct. 1876, 1885 (1998) (observing "respect for corporate distinctions [even] when the subsidiary is a polluter").[13]

6. The Court of Appeals also erred in failing to recognize that Section 274's legislative history condemns it as a bill of attainder. App. 18a. Congress explained that the measure was necessary because "the RBOCs have been found to have committed a number of anticompetitive violations — many eerily reminiscent of pre-divestiture Bell System abuses." H.R. Rep. No. 102-850, 102d Cong., 2d Sess. 51 (1992). Congress observed that U S WEST had agreed to pay civil penalties under the MFJ, and that, "in 1990, a grand jury returned a criminal indictment against NYNEX for illegally providing information services." *Id.* at 53. Yet U S WEST acted "without any admission of a willful violation of the MFJ or of any of the

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[13] Section 274 cannot be defended as a temporary ban. App. 16a. The five-year waiting period in the statute in *Brown* did not prevent the law from being a bill of attainder. *See* 381 U.S. at 458. Bills of attainder "may inflict punishment absolutely, or may inflict it conditionally." *Cummings*, 71 U.S. at 324.

Nor can Section 274 be justified by other parts of the 1996 Act. App. 14a. An otherwise impermissible punishment cannot be overshadowed or outweighed by the inclusion of purported collateral benefits in separate parts of a statute. This would involve weighing incommensurables in a process akin to "judging whether a particular line is longer than a particular rock is heavy." *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring). And the long-distance and manufacturing provisions of the 1996 Act can hardly be considered "benefits" for the BOCs. In many respects, it is more difficult for a BOC to enter long distance under Section 271(c) than it was under the Decree. *See* pp. 8-9 & n.8, *supra*. Unlike a "plea bargain" in which a named company or individual is given the option to accept certain restrictions or other sanctions in exchange for specific benefits, the 1996 Act gave the BOCs *no choice* whether to accept the restrictions in the Special Provisions.

antitrust laws," *United States v. Western Elec. Co.*, 1991-1 Trade Cas. (CCH) ¶ 69,329 (D.D.C. 1991), and the D.C. Circuit *vacated* the penalties imposed against NYNEX. *United States v. NYNEX Corp.*, 8 F.3d 52 (D.C. Cir. 1993).

Nonetheless, Congress concluded that an assumption of "no anticompetitive behavior by the RBOCs" is "an assumption at odds with the entire history of the telecommunications industry as well as recent RBOC behavior." H.R. Rep. No. 102-850, at 49. Congress went so far as to ratify the self-serving allegations of RBOC competitors that the RBOCs had committed "60 anticompetitive abuses" since divestiture. *Id.* at 52 n.304. Then-Assistant Attorney General Bingaman was asked during her testimony in support of the Special Provisions, "Is it fair to attribute the past behavior of the old united AT&T Bell system to the Bell companies today? Why should [Congress] assume that they will have the same incentive to discriminate and cross-subsidize that AT&T had?" Her answer was unequivocal: "It is really not an assumption, it is a fact." *Telecommunications: Hearings before the House Comm. on the Judiciary on the Role of the Department of Justice*, 104th Cong., 1st Sess. 60 (1995). *See also* 141 Cong. Rec. S8138 (June 12, 1995) (Sen. Kerrey) ("The Department of Justice offered in court almost 100 witnesses and thousands of documents as it systematically laid out the facts that demonstrated how the Bell system unlawfully used the local exchange bottleneck to hurt competition in other markets."); 141 Cong. Rec. S7952 (June 8, 1995) (Sen. Dorgan) (looking to "the old Bell system" and "the history of the AT&T breakup" in justifying restrictions on BOCs).

Not surprisingly, some members of Congress warned that the statute raised serious questions under the Bill of Attainder Clause. H.R. Rep. No. 102-850 at 111, 115-16 (dissenting views of Rep. Fish and Rep. Moorhead).

B. Section 274 Violates the First Amendment.

1. The Court of Appeals also erred in holding that Section

274 did not trigger strict scrutiny in light of its speaker-specific nature. In *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), this Court invalidated a paper and ink tax under the First Amendment "because it target[ed] a small group of" publishers; this Court held that the State's power "to tailor" legislation "so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by [the State] [could] justify the scheme." *Id.* at 592; *see also Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (tax which fell on 13 of approximately 135 newspapers invalid).

The First Amendment violation here is even starker than it was in *Minneapolis Star* and *Grosjean*. The statutes in those cases used neutral criteria that had the effect of singling out particular speakers. Section 274 lacks even that subtlety: it targets specific firms *by name*. "In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85 (1978) (emphasis added).[14]

In reaching the contrary result, the Court of Appeals misconstrued this Court's decision in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (*Turner I*). The portion of the *Turner I* opinion on which the D.C. Circuit relied (App. 20a-21a) addressed general laws drawing broad distinctions among different media. There, this Court explained

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[14] *See also Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221, 228-30 (1987) (tax that "targets a small group" of publishers is constitutionally suspect); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) (describing *Bellotti* as involving a "speaker-based restriction"); *Madison School District v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 176 (1976) (public board may not "discriminate between speakers" at its meetings); *Police Department of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("[W]e have frequently condemned . . . discrimination among different users of the same medium for expression").

that strict scrutiny is not triggered by a law that, for example, regulates cable operators without regulating broadcasters. 512 U.S. at 657-58.

In the *next* section of the opinion, however, this Court addressed narrow laws that discriminate among speakers within the *same medium*, and this Court reaffirmed that laws "target[ing] a small number of speakers" remain constitutionally suspect. *Id.* at 660. This Court found the must-carry rules permissible because they were "broad-based, applying to almost all cable systems in the country." *Id.* Section 274, by contrast, is not broad-based. It focuses on the BOCs — alone among more than 1,300 incumbent LECs — with the precision of a laser beam. It would be as if the must-carry rules in *Turner Broadcasting* applied only to Time Warner.[15]

2. Section 274 also triggers strict scrutiny because it is content-based. By its terms, it operates according to the "subject matter, viewpoint, or format" of the information that a BOC wishes to present. *Turner I*, 512 U.S. at 646. If the information is "generally considered comparable to" television broadcasts (47 U.S.C. § 522(20)), then a BOC may provide it. If the information is "like or similar" to the kind of speech listed in 47 U.S.C. § 274(h),[16] then it is prohibited. The only way to decide whether something is permitted under Section 274 is to inquire

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[15] Nor can Section 274 be justified on the basis of alleged "bottleneck monopolies." App. 21a. Congress could have written the statute to apply to all LECs with bottleneck monopoly power, but it did not. Instead, the law applies only to the BOCs, regardless of whether other LECs enjoy such power. Section 274 does not contain the kind of neutral technological criterion that *Turner* suggested would give rise to no constitutional concern.

[16] "[N]ews (including sports); entertainment (other than interactive games); business, financial, legal, consumer, or credit materials; editorials, columns, or features; advertising; photos or images; archival or research materials; legal notices or public records; scientific, educational, instructional, technical, professional, trade or other literary materials; or other like or similar information." 47 U.S.C. § 274(h).

regarding its content, and then to make a necessarily subjective evaluative judgment.

The Court of Appeals did not dispute this proposition, but it insisted that "to a large extent neutrality is now gauged by reference to a statute's justifications." App. 22a. Yet this Court has always held that bans on speech are content-based, not content-neutral, when (as here) they operate *by their very terms* according to the communicative content of expression. *E.g.*, *Burson v. Freeman*, 504 U.S. 191, 197, 207 (1992); *FCC v. League of Women Voters*, 468 U.S. 364, 383 (1984). "Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content." *Turner I*, 512 U.S. at 642-43; *Cincinnati v. Discovery Network*, 507 U.S. 410, 429 (1993) (it is irrelevant whether "the *justification* for the regulation is content neutral").

3. The Court of Appeals also erred in holding that Section 274 could survive intermediate scrutiny, if it were applicable.

a. This Court has instructed that "a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfeld v. Fane*, 507 U.S. 761, 770-71 (1993). That burden "is not satisfied by mere speculation and conjecture," *id.* at 770, or by "anecdotal evidence and educated guesses." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995). *See also Ibanez v. Florida Dept. of Business & Professional Reg.*, 512 U.S. 136, 142-44 (1994).

The most the Court of Appeals could muster was an inference as to "Congress' apparent concern about anticompetitive risks." which the court maintained was "at least plausible." App. 23a. But there has never been any *evidence* to support a prohibition on BOC provision of information services or electronic publishing. That charge was not part of the Government's case against AT&T, and the restriction was not supported by any findings of wrongdoing. "[T]here really was no record to speak of

concerning AT&T's activities in the information services market. The parties agreed to the information services restriction as a precautionary measure in light of uncertainty about how the divestiture of AT&T would affect development of this embryonic market." *Western Elec. Co.*, 900 F.2d at 307-08.

The prohibition was lifted in 1991 as a result of the well-documented and extensively supported showing by the DOJ and FCC — which the D.C. Circuit upheld, *Western Elec. Co.*, 993 F.2d at 1578-82 — that a restriction on BOC provision information services was *anticompetitive*. According to the government's prior view, such a law was not only unjustified, but also affirmatively counterproductive because it harmed the interests of consumers. The D.C. Circuit found that the evidence supporting DOJ and the FCC was so strong "that any district court rejection of the proposed modification would have been reversible error" and any findings that "contradict[ed] the Department's conclusions [would have been] clearly erroneous." *Id.* at 1578.

Thus, prior to the 1996 Act, the BOCs had been permitted to provide information services, including electronic publishing, since October 1991. Neither Congress nor the FCC found any evidence of harm from this real-world experience. Indeed, Congress found that independent information service providers were "thriving" in 1994, three years *after* the BOCs were permitted to enter that market. H.R. Rep. No. 103-559(II), 103d Cong., 2d Sess. 25 (1994). Moreover, any residual risk presented by the BOCs' alleged historical "bottleneck" control over local telephone exchanges was subsequently addressed directly by Sections 251-53 of the 1996 Act, which open local markets to all competitors. A ban on information services or electronic publishing — which never had any justification to begin with — is now utterly without basis.

In *Turner I*, a plurality of this Court explained that, even when Congress makes "unusually detailed" factual findings that "are recited in the text of the Act itself," 512 U.S. at 632, 646, in a First Amendment case a reviewing court is obligated to

exercise "independent judgment" to ensure that the Government has "demonstrated that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* at 665, 666. The cable must-carry rules were adopted by Congress along with extensive factual findings made in the text of the statute itself. In addition, this Court noted that the factual development on remand had yielded "a record of tens of thousands of pages" of evidence. *Turner Broadcasting System, Inc. v. FCC*, 117 S. Ct. 1174, 1185 (1997) (*Turner II*) (internal quotation omitted). The Court stressed that there was a "substantial basis to support Congress' conclusion that a real threat justified enactment of the must-carry provisions." 117 S. Ct. at 1190. The Court pointed to "specific support" for Congress' conclusion (*id.*): "substantive evidence" and "contemporaneous stud[ies]" regarding market structure and market power exercised by cable operators (*id.* at 1192-93); and "[e]mpirical research in the record before Congress" (*id.* at 1195).

In contrast, here the FCC has not attempted to find —- nor could it find — comparable support in the record before Congress to justify Section 274. Indeed, all available evidence shows that such a restriction is not only *unnecessary* but *anticompetitive* and *counterproductive*. Accordingly, any defense of Section 274 would rest on precisely the kind of speculation that this Court has repeatedly rejected under the intermediate scrutiny standard.

b. Further, Section 274 is not a narrowly tailored method of addressing whatever competitive risks the Government might believe exist. The dangers of improper cost allocation and discrimination can be addressed directly through regulations outlawing those practices. Indeed, prior to the 1996 Act the FCC developed "a comprehensive system of accounting and non-accounting safeguards" to do just that[17] — without erecting (as

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[17] *Implementation of Section 254(k) of the Communications Act of 1934, as*

Section 274 does) a wall of separation between BOCs and protected speech. *See* 47 C.F.R. § 64.702(b).

Thus, "[i]t is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the [Government's] goal." *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1510 (1996) (plurality opinion). In fact, the FCC has repeatedly confirmed its view that nonstructural safeguards *better* serve the public interest than do separate subsidiary requirements. In the information services proceeding before the D.C. Circuit, the FCC endorsed a system of integration, together with appropriate accounting safeguards, on the ground that it "allows regulated service ratepayers to share in the benefit of efficiencies gained through joint use of the network."[18] Indeed, the FCC has consistently found that "nonstructural safeguards could protect competing enhanced service providers [such as electronic publishers] from anticompetitive activity by the BOCs while avoiding the inefficiencies associated with structural separation."[19] For intermediate scrutiny be satisfied on this record, such scrutiny would have to be essentially toothless.

Amended, 12 FCC Rcd 6415, ¶ 3 (1997) (citations omitted).

[18] Memorandum of the Federal Communications Commission as Amicus Curiae Supporting Removal of Restriction on BOC Provision of Information Services 17 (Aug. 22, 1990).

[19] *See Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, 10 FCC Rcd 8360, 8364 (1995). *See also* Further Notice of Proposed Rulemaking, *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review — Review of Computer III and ONA Safeguards and Requirements*, CC Docket Nos. 95-20, 98-10, FCC 98-8, at ¶¶ 7, 43-59 (Jan. 30, 1998) (reaffirming superiority of nonstructural safeguards).

CONCLUSION

This petition should be held in abeyance pending the decision on certiorari in No. 98-652; if certiorari is not granted in No. 98-652, then it should be granted in this case.

Respectfully submitted.

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DECEMBER 1998

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1113

BELLSOUTH CORPORATION, Petitioner
v.
FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents
AT&T Corporation, et al., Intervenors

May 15, 1998

STEPHEN F. WILLIAMS, Circuit Judge:

Petitioner BellSouth Corporation challenges the constitutionality of Section 274 of the Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 274, and of the Federal Communications Commission's order implementing that provision.[1] Section 274 limits the ability of Bell operating companies ("BOCs") to provide "electronic publishing," a category that includes disseminating news articles, offering literary material, and providing services similar to the Lexis/Nexis and Westlaw databases. BellSouth says § 274 is an unconstitutional bill of attainder, stressing the fact that the subjects of its restrictions, the BOCs, are singled out by name. BellSouth also complains that § 274 impermissibly abridges its First Amendment rights of free expression. We reject both challenges.

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[1] The order under challenge is *Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, FCC No. 97-35 (Feb. 7, 1997). BellSouth's challenge to the order is entirely derivative of its constitutional challenge to the statute, with no claim that the FCC acted outside the scope of its statutory authority.

The story behind the Telecommunications Act of 1996 has often been told, although electronic publishing restrictions have usually amounted to little more than a subplot. In 1982 a consent decree was entered in settlement of the government's 1974 antitrust suit against AT&T. That decree, as modified by the district court, became known as the "Modification of Final Judgment," or "MFJ." See *United States v. American Tel. & Tel. Co.*, 552 F.Supp. 131 (D.D.C.1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001, 103 S.Ct. 1240, 75 L.Ed.2d 472 (1983). The MFJ required AT&T to divest itself of its local exchange monopolies. Under the reorganization plan approved by the district court, the twenty BOCs eventually named in the 1996 Act were spun off from AT&T and grouped into seven regional Bell operating companies, or "RBOCs" (now five thanks to mergers), of which BellSouth is one.[2]

The MFJ initially prohibited the BOCs from providing "information services," defined to include electronic publishing. The prohibition rested on two concerns commonly voiced about regulated monopolists operating in fields adjacent to their monopolies. First, to the extent that the monopolist's good or service is an input for the adjacent industry, the monopolist may offer its own enterprise discriminatory advantages, in this case "favorable access to the local network." 552 F.Supp. at 189. Second, the monopolist may use monopoly revenues to subsidize its associated enterprise. *Id.* In a "triennial review" process established by the decree, the Department of Justice moved to lift the information services restrictions, and no party to the decree opposed the motion. The district court ultimately did lift them. *United States v. Western Electric Co.*, 767 F.Supp. 308 (D.D.C.1991), *aff'd*, 993 F.2d 1572 (D.C.Cir.1993). We will return later to the analysis supporting that result, which

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[2] AT&T also divested its minority holdings in the Cincinnati Bell Telephone Company and the Southern New England Telephone Company, which are not classified as BOCs in the Act.

BellSouth says helps its constitutional case against § 274.

The 1996 Act rescinded the MFJ, see Pub.L. No. 104-104, § 601, 110 Stat. 143 (1996), and changed the entire telecommunications landscape. Several key provisions of the Act apply to incumbent local exchange carriers generally, such as 47 U.S.C. § 251, requiring them to offer nondiscriminatory access and interconnection to local competitors. Sections 271 through 276 of the Act, however, entitled "Special Provisions Concerning Bell Operating Companies," are applicable to the BOCs and their affiliates alone.[3] For example, § 271 establishes

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[3] The Act defines "Bell operating company" as follows:

> The term "Bell operating company"--
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> (A) means any of the following companies: Bell Telephone Company of Nevada, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, Michigan Bell Telephone Company, New England Telephone and Telegraph Company, New Jersey Bell Telephone Company, New York Telephone Company, U.S. West Communications Company, South Central Bell Telephone Company, Southern Bell Telephone and Telegraph Company, Southwestern Bell Telephone Company, The Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Company, The Chesapeake and Potomac Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia, The Diamond State Telephone Company, The Ohio Bell Telephone Company, The Pacific Telephone and Telegraph Company, or Wisconsin Telephone Company; and
>
> (B) includes any successor or assign of any such company that provides wireline telephone exchange service; but
>
> (C) does not include an affiliate of any such company, other than an affiliate described in subparagraph (A) or (B).
>
> 47 U.S.C. § 153(4).

requirements that must be met before the BOCs can break into the long distance, or "interLATA," market, see *SBC Communications, Inc. v. FCC,* 138 F.3d 410 (D.C.Cir.1998); § 273 bars the BOCs from manufacturing and selling telecommunications equipment until they have received authorization to enter the interLATA market; and § 275 prohibits BOCs (other than Ameritech) from providing alarm monitoring services for five years, see *Alarm Industry Communications Committee v. FCC,* 131 F.3d 1066, 1067 (D.C.Cir.1997). In general these provisions simply maintained, and in most cases loosened, various restrictions to which the BOCs were already subject under the MFJ. By contrast, the provision at issue here--§ 274--reimposed on the BOCs some of the information services restrictions that had been lifted in 1991. BellSouth challenges only that provision and the FCC order of implementation.[4]

Section 274 provides:

> No Bell operating company or any affiliate may engage in the provision of electronic publishing that is disseminated by means of such Bell operating company's or any of its affiliates' basic telephone service, except that nothing in this section shall prohibit a separated affiliate or electronic publishing joint venture operated in accordance with this section from engaging in the provision of electronic publishing.

47 U.S.C. § 274(a). Section 274's restrictions expire on February 8, 2000, four years from the date of the Act's passage. § 274(g)(2).

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[4] We note that another RBOC has launched a Bill of Attainder Clause and First Amendment challenge to the "Special Provisions" as a whole. See *SBC Communications, Inc. v. FCC,* 981 F.Supp. 996 (N.D.Tex.1997).

As is evident from its text, § 274 provides two pathways for BOCs wishing to enter electronic publishing: the "separated affiliate" route and the "joint venture" route. The statute defines a separated affiliate as "a corporation under common ownership or control with a Bell operating company that does not own or control a Bell operating company and is not owned or controlled by a Bell operating company." 47 U.S.C. § 274(i)(9). An "electronic publishing joint venture" is a "joint venture owned by a Bell operating company or affiliate that engages in the provision of electronic publishing which is disseminated by means of such Bell operating company's or any of its affiliates' basic telephone service." 47 U.S.C. § 274(i)(5). Section 274 imposes several structural requirements on both separated affiliates and electronic publishing joint ventures. See generally 47 U.S.C. § 274(b). For example, each such entity must maintain books, records, and accounts separately from the BOC with which it is affiliated, § 274(b)(1), may have "no officers, directors, and employees in common" with a BOC, § 274(b)(5)(A), and may "own no property in common," s 274(b)(5)(B).

The Act defines "electronic publishing" broadly as

> the dissemination, provision, publication, or sale to an unaffiliated entity or person, of any one or more of the following: news (including sports); entertainment (other than interactive games); business, financial, legal, consumer, or credit materials; editorials, columns, or features; advertising; photos or images; archival or research material; legal notices or public records; scientific, educational, instructional, technical, professional, trade, or other literary materials; or other like or similar information.

47 U.S.C. § 274(h)(1). It then exempts several types of services, including data processing, voice messaging, and video

programming. 47 U.S.C. § 274(h)(2).

BellSouth, of course, is not a BOC but an RBOC. Yet the government rightly refrains from raising a standing defense on that ground. The injury BellSouth suffered as the sole shareholder of two affected corporations (South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company) is clearly enough to give it Article III standing. See *Franchise Tax Board of California v. Alcan Aluminium Ltd.*, 493 U.S. 331, 336, 110 S.Ct. 661, 663-664, 107 L.Ed.2d 696 (1990). Besides, as an affiliate of two BOCs, § 274(i)(1), BellSouth is itself affected; it can engage in electronic publishing only by maintaining structural separation from its BOCs.

Bill of Attainder Challenge

We turn first to BellSouth's challenge under Article I, section 9, clause 3 of the Constitution, which says that "[n]o Bill of Attainder or ex post facto Law shall be passed" by Congress. For the framers of the Constitution the term "bills of attainder" carried a specific meaning: it referred to parliamentary acts sentencing named persons to death without the benefit of a judicial trial. As early as 1810, however, in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 3 L.Ed. 162 (1810), Chief Justice Marshall noted in dictum that the prohibition on bills of attainder ought to extend to legislation subjecting specified persons to penalties short of death--what the framers called "bills of pains and penalties." *Id.* at 138, 3 L.Ed. 162; *United States v. Brown*, 381 U.S. 437, 447, 85 S.Ct. 1707, 1714, 14 L.Ed.2d 484 (1965). Later in the nineteenth century the Supreme Court confirmed that the legislative punishments foreclosed by the Bill of Attainder Clause include bills of pains and penalties. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 320, 323, 18 L.Ed. 356 (1866). Moreover, the Court has recognized that not all bills of attainder expressly name their targets; some simply describe them.

Brown, 381 U.S. at 442, 85 S.Ct. at 1711-12. In sum, the Court has developed a potentially sweeping definition of forbidden attainders, holding that "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution." *United States v. Lovett,* 328 U.S. 303, 315-16, 106 Ct.Cl. 856, 1079, 66 S.Ct. 1073, 90 L.Ed. 1252 (1946). The result is a prohibition triggered when a legislative act meets two tests--first, that it apply with specificity, and second, that it impose punishment.

Even classic attainders seem not only to have specified individuals but also classes--defined as the confederates of a named traitor, as in the case of the attainder against the Earl of Kildare and his associates during the reign of Henry VIII. See *Cummings,* 71 U.S. at 323-24, 18 L.Ed. 356. But the Supreme Court watered down the specificity requirement a bit more when it invalidated two post-Civil War enactments targeting all persons who could not truthfully swear that they had been loyal to the Union during the war. See *Cummings; Ex parte Garland,* 71 U.S. (4 Wall.) 333, 18 L.Ed. 366 (1866). And in *Lovett* it said generally that specificity is shown if the law applies to "easily ascertainable members of a group." 328 U.S. at 315, 66 S.Ct. at 1079. Since virtually all legislation operates by identifying the characteristics of the class to be benefited or burdened, it is not clear that the specificity requirement retains any real bite. In any event, it is obviously met here, since § 274's requirements apply uniquely to the twenty BOCs identified by name in the Act.

We assume, as do the parties, that the Bill of Attainder Clause protects corporations as well as individuals. Although the Supreme Court has yet to address the question directly, it has suggested as much in dictum, see *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211, 239 n. 9, 115 S.Ct. 1447, 1463 n. 9, 131 L.Ed.2d

328 (1995) (indicating that Bill of Attainder Clause applies to laws that burden "a single individual or firm"), and comparable constitutional rights have been extended to legal "persons" taking the corporate form. See, e.g., *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881 n. 9, 105 S.Ct. 1676, 1683 n. 9, 84 L.Ed.2d 751 (1985) (equal protection); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977) (double jeopardy). The clause's coverage clearly seems to include at least closely held corporations, where an attainder would fall on a narrowly circumscribed, easily identified group of flesh-and-blood people.[5] Given the parties' shared assumption, we will not explore the issue further.

At times BellSouth comes close to arguing that the specification requirement ought to be the end of the matter. On this view, the Bill of Attainder Clause bars Congress from singling out a specified class of persons for burdens of any kind, regardless of whether those burdens can be viewed as punishments in any ordinary sense of the term. This was the theme of a famous student essay, Note, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 Yale L.J. 330 (1962), and traces of the same approach can be found in the Supreme Court's most extensive discussion (and most expansive application) of the clause, *United States v. Brown*, 381 U.S. 437, 442, 85 S.Ct. 1707, 1711-12, 14 L.Ed.2d 484 (1965). For example, *Brown* said in a footnote that "a legislature can provide that persons possessing certain characteristics *must abstain from certain activities*, but must leave to other tribunals the task of deciding

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[5] At least it would do so if it took the form of a conventional penalty such as a fine. If it took the form of a restriction barring certain closely held corporations from specific lines of business, its effect on flesh-and-blood people would depend on the language of the restriction and on the ability of officers, directors and shareholders to carry on their pursuits outside the named corporations. See below at pp. __.

who possesses those characteristics." *Id.* at 454 n. 29, 85 S.Ct. at 1718 n. 29 (emphasis added). And *Brown*'s explanation of the clause "as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply--trial by legislature," *id.* at 442, 85 S.Ct. at 1711-12, certainly lent itself to sweeping application. Nonetheless, even *Brown* seemed at times to limit itself to punishments, saying, for example, that the clause "reflected the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons." *Id.* at 445, 85 S.Ct. at 1713. Such a limitation is practically indispensable: given the demise of the requirement that a forbidden attainder fall on named individuals, and the elusive character of *Brown*'s own effort to articulate a coherent specificity test to replace that requirement, see 381 U.S. at 455 n. 29, 85 S.Ct. at 1718 n. 29, a definition of attainder that encompassed any burden imposed on specified individuals or groups would cut a broad swath, mowing down much of the Supreme Court's equal protection jurisprudence at a single stroke.

In any event, whatever *Brown*'s potential for diluting the punishment requirement, the Supreme Court has since taken that requirement seriously. It made this emphatically clear in *Nixon v. Administrator of General Services,* 433 U.S. 425, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977), where the law at issue burdened a single person. Despite the statute's surgical focus on a sole individual, the Court held that "the mere specificity of a law does not call into play the Bill of Attainder Clause," *id.* at 471 n. 33, 97 S.Ct. at 2805 n. 33, and indeed that Congress had on that occasion singled out "a legitimate class of one," *id.* at 472, 97 S.Ct. at 2805.[6] It insisted that the burden must be a punishment

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[6] See also *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 n. 9, 115 S.Ct.

to qualify as a bill of attainder, and considered three questions in determining whether it was. *Id.* at 478-84, 97 S.Ct. at 2808-13. Despite Chief Justice Burger's suggestion that the *Nixon* precedent itself would become a "class of one," *id.* at 544-45, 97 S.Ct. at 2841 (Burger, C.J., dissenting), the Court later formalized the punishment inquiry into a three-part test, asking

> (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes; and (3) whether the legislative record evinces a congressional intent to punish.

Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841, 852, 104 S.Ct. 3348, 3355, 82 L.Ed.2d 632 (1984) (citations and internal quotation marks omitted). Unlike our dissenting colleague, Dissent at 3, 5, 6, we see no warrant in the precedents for treating Congress's specification of the BOCs by name as a material element in the punishment analysis. Cf. *Brown,* 381 U.S. at 461, 85 S.Ct. at 1721 (describing supposed contrast between naming and mere specification as a "distinction[ ] without a difference"). We take up each of the three factors in turn.

To begin with, § 274's restrictions are nothing like the classic attainders known to the framers. As mentioned above, bills of

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1447, 1463 n. 9, 131 L.Ed.2d 328 (1995) ("[L]aws that impose a duty or liability upon a single individual or firm are not on that account invalid--or else we would not have the extensive jurisprudence that we do concerning the Bill of Attainder Clause, including cases which say that it requires not merely 'singling out' but also punishment, see, e.g., *United States v. Lovett,* 328 U.S. 303, 315-18 [106 Ct.Cl. 856, 66 S.Ct. 1073, 1078-80, 90 L.Ed. 1252] (1946), and a case which says that Congress may legislate 'a legitimate class of one,' *Nixon v. Administrator of General Services,* 433 U.S. 425, 472 [97 S.Ct. 2777, 2805, 53 L.Ed.2d 867] (1977).").

attainder at common law generally entailed execution, although this was typically coupled with other punishments, such as "corruption of blood," which prevented the attainted party's heirs from inheriting his property. See *Brown*, 381 U.S. at 441, 85 S.Ct. at 1711. Bills of pains and penalties, also forbidden by the clause, "commonly imposed imprisonment, banishment, and the punitive confiscation of property." *Selective Service System*, 468 U.S. at 852, 104 S.Ct. at 3355.

The case becomes closer when we move from historic antecedents to burdens later found by the Supreme Court to rank as punishments, which have included "legislative bars to participation by individuals or groups in specific employments or professions." *Id.* at 852, 104 S.Ct. at 3355. Indeed, the Court's four major decisions invalidating statutes on Bill of Attainder Clause grounds have all involved legislation preventing specific classes of persons from pursuing certain occupations. Those four cases came in two pairs. The first pair involved restrictions imposed immediately after the Civil War on those who had sided with the South, see *Cummings* (striking down amendments to Missouri constitution denying right to vote, hold office, teach, or serve as trustee for religious organization to persons who aided or sympathized with the Confederacy), and *Garland* (striking down federal law requiring attorneys to swear oath that they had never assisted Confederacy as condition of admission to practice in federal courts).[7] The second pair involved restrictions on Communist Party members during the Cold War, see *Lovett* (invalidating law cutting off payment of salaries to three named federal employees who were Party members), and *Brown* (invalidating law making it a crime for members of Party to serve as officers or employees of labor unions).

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[7] See also *Pierce v. Carskadon*, 83 U.S. (16 Wall.) 234, 21 L.Ed. 276 (1872) (memorandum opinion striking down West Virginia loyalty oath similar to those invalidated in *Cummings* and *Garland*).

Although a statute imposing structural separations on corporations seeking to engage in specific types of commercial activity may be analogous to such traditional employment debarments, the analogy is very loose indeed. Even if we ignore the BOCs' freedom under § 274 to enter electronic publishing through structurally separated affiliates, the section is nothing more than a line-of-business restriction, comparable for example to the Glass-Steagall Act's limitation on the entry of commercial banks into investment banking, 12 U.S.C. §§ 24 (Seventh), 78, or to the cross-ownership restrictions on broadcasters upheld in *FCC v. National Citizens Committee for Broadcasting,* 436 U.S. 775, 98 S.Ct. 2096, 56 L.Ed.2d 697 (1978). Although membership in the class of commercial banks or broadcasting firms is easy enough to ascertain, no one has suggested that those laws work an unconstitutional attainder. Indeed the Supreme Court in *Brown* strongly suggested that line-of-business restrictions pose no bill of attainder concerns, distinguishing the statute at issue there, which barred Communists from high office in labor unions, from § 32 of the Banking Act of 1933 (now codified at 12 U.S.C. § 78), a conflict-of-interest statute preventing employees of securities underwriting firms from working for banks that belong to the Federal Reserve System. *Brown,* 381 U.S. at 453-55, 85 S.Ct. at 1717-18; see also *Board of Governors v. Agnew,* 329 U.S. 441, 67 S.Ct. 411, 91 L.Ed. 408 (1947) (upholding § 32 of Banking Act, though without addressing bill of attainder issue). *Brown* reasoned that each of the invalidated employment prohibitions "inflict[ed] its deprivation upon the members of a political group thought to present a threat to the national security," 381 U.S. at 453, 85 S.Ct. at 1717, and further contrasted the conflict-of-interest statute as "incorporat[ing] no judgment censuring or condemning any man or group of men." *Id.* at 453-54, 85 S.Ct. at 1717. It is apparent--and will be more so when we examine legislative purpose--that § 274 falls on the nonpunitive side of those lines.

Placing § 274 among the burdens historically forbidden as

attainders seems especially dubious because it does not bar the BOCs from electronic publishing but simply requires structural separation. As counsel for BellSouth acknowledged at oral argument, the separated affiliate mechanism permits his client to establish a wholly-owned subsidiary to pursue electronic publishing. This subsidiary could disseminate materials over the telephone lines of BellSouth's BOC subsidiaries, as long as it was kept separate from them in the ways prescribed by § 274(b). Indeed, BellSouth itself could enter the electronic publishing business provided it observed the norms of separation from its BOCs. In short, § 274 leaves all the investors with stakes in the BOCs (i.e., the shareholders of the RBOCs) free to pursue their collective electronic publishing ends, and to aggregate their capital to achieve those ends, subject only to structural separation requirements. While structural separation is hardly costless, neither does it remotely approach the disabilities that have traditionally marked forbidden attainders.

The second criterion asks whether the challenged legislation, considering the type and severity of the burdens it imposes, can reasonably be said to further nonpunitive legislative purposes. This factor appears to be the most important of the three. See *Siegel v. Lyng*, 851 F.2d 412, 418 (D.C.Cir.1988) ("The line of Supreme Court law on the Bill of Attainder Clause indicates that legislation will survive Bill of Attainder attack if the statute furthers nonpunitive legislative purposes."). On the one hand, where an enactment falls outside the historical definition of punishment, the second factor prevents Congress from circumventing the clause by cooking up newfangled ways to punish disfavored individuals or groups. *Selective Service System*, 468 U.S. at 853-54, 104 S.Ct. at 3355. On the other hand, "[e]ven measures historically associated with punishment--such as permanent exclusion from an occupation--have been otherwise regarded when the nonpunitive aims of an apparently prophylactic measure have seemed sufficiently clear and convincing." Laurence H. Tribe, *American Constitutional Law*,

§ 10-5, at 655 (2d ed.1988).

In fact, apart from its specific targeting aspect, we find that § 274 has the earmarks of a rather conventional response to commonly perceived risks of anticompetitive behavior. We have long recognized that structural separation is "a permissible regulatory tool" for ensuring "that no cross-subsidization or unfair competitive practices occur." *Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198, 219 (D.C.Cir.1982). We return shortly to the realism of those risks, but pause here to note that BellSouth's claim of punitive purpose is somewhat undermined by § 274's placement in an Act that as a whole *relieves* the BOCs of several of the burdens imposed by the MFJ, particularly by prescribing in § 271 a method whereby the BOCs can achieve a long-sought-after presence in the long-distance market.[8]

BellSouth advances two arguments in support of its claim that Congress cannot reasonably be said to have enacted s 274 for nonpunitive purposes. First, it says the court's 1991 removal of the information services prohibition from the MFJ--based on a finding that its removal could reasonably be found to advance the public interest (balancing the risk of BOC discrimination against competing information services ventures with the competitive benefits of BOC entry)--shows that Congress in 1996 had no plausible economic basis for reimposing electronic publishing restrictions. Second, BellSouth points to other local exchange carriers who are not covered by § 274's proscriptions. To the extent the BOCs pose any anticompetitive threat, says BellSouth, then so do the excluded firms, and their exclusion demonstrates that Congress's real aim was to punish the BOCs.

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[8] Because we find no attainder, we need not wrestle with the issue of remedy. Severability is largely a matter of legislative intent, and it is doubtful that Congress would have intended the many provisions of the Act beneficial to the BOCs to survive deletion of this burdensome one.

As we said earlier, the information services ban was lifted from the MFJ at the behest of the Department of Justice, which had insisted on the ban when the MFJ was being negotiated. Circumstances had changed, the government argued; the information services market had become more competitive, and the BOCs' ability to discriminate and cross-subsidize had consequently decreased. The district court initially rejected the government's proposal, *United States v. Western Electric Co.*, 673 F.Supp. 525, 587-97 (D.D.C.1987), but we reversed, saying that the court had used too stringent a standard to evaluate the government's motion, which no party to the consent decree had opposed. *United States v. Western Electric Co.*, 900 F.2d 283, 292 (D.C.Cir.1990). On remand the district court lifted the information services ban. *United States v. Western Electric Co.*, 767 F.Supp. 308 (D.D.C.1991). We affirmed, noting that under the applicable "public interest" standard "the record before the court was such that any district court rejection of the proposed modification would have been reversible error." *United States v. Western Electric Co.*, 993 F.2d 1572, 1577-78 (D.C.Cir.1993). That record, we said, contained "persuasive evidence that, despite their local monopoly power, the BOCs will be unable to discriminate against competing information service providers." *Id.* at 1579-80. We also concluded that there was powerful evidence to counter any suggestion that the BOCs would be able to use their price-regulated monopolies to subsidize their entry into information services. *Id.* at 1580-81.

Obviously Congress's reading of the evidence in 1996 was different from the one arrived at by the Department of Justice in 1987--or by this court in 1993 for that matter. It does not follow from these conflicts between branches, however, that Congress cannot rationally be said to have pursued nonpunitive purposes in enacting § 274. Certainly our triennial review decisions never suggested that the risks of anticompetitive conduct were so feeble that no one could reasonably assert them except as a smokescreen for some invidious purpose (much less for the

specific invidious purpose of "punishing" the BOCs). And we note that § 274 is less severe than the analogous pre-1991 MFJ provision along several dimensions: it applies only to electronic publishing rather than to information services as a whole, it expires after five years rather than continuing indefinitely, and it mandates structural separation rather than complete exclusion.

BellSouth complains that this reading of the second factor reduces it to little more than a rational basis test, the most anemic form of constitutional scrutiny. If this were strictly true, of course, the Bill of Attainder Clause (as applied to non-suspect classes such as the BOCs) would do nothing more than duplicate the Equal Protection Clause. But the Supreme Court's attainder inquiry is in fact more exacting than a rational basis test, because it demands purposes that are not merely reasonable but nonpunitive. Punitive purposes, however rational, don't count.

BellSouth's second argument focuses on the fact that § 271 does not cover several large non-BOC local exchange carriers, in particular GTE Corporation.[9] GTE, which was never part of the AT&T system, supplies about 18.4 million access lines in 27 states; by comparison, BellSouth supplies about 24.5 million access lines in nine states. 1996 FCC Statistics of Communications Common Carriers 21 (1997). Although its operations are generally rural, as of 1993 "GTE control[led] local exchange service in the entire state of Hawaii as well as in large portions of the Tampa and Los Angeles markets." *United States v. Western Electric Co.*, 993 F.2d at 1579. Other non-BOC carriers, such as Southern New England Telephone with about 2.1 million access lines in Connecticut, are also not covered by

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[9] Like the BOCs, GTE was subject to a consent decree for more than a decade, until the passage of the Act. The decree, however, permitted GTE to provide information services, subject to structural separation and non-discrimination requirements. See *United States v. GTE Corp.*, 603 F.Supp. 730, 742 (D.D.C.1984).

§ 274. 1996 FCC Statistics of Communications Common Carriers 21 (1997). From this selectivity--which BellSouth labels under-inclusiveness--BellSouth would have us draw an inference of punitive purpose.

But the differential treatment of the BOCs and non-BOCs is neither suggestive of punitive purpose nor particularly suspicious. Because the BOCs' facilities are generally less dispersed than GTE's, they can exercise bottleneck control over both ends of a telephone call in a higher fraction of cases than can GTE. The BOCs thus enjoy a materially greater opportunity to shift costs from their electronic publishing pursuits to their rate-regulated local exchange ventures.[10] In addition, because GTE (unlike the BOCs) is not the dominant provider of local exchange service in any state except Hawaii, state regulators can use the costs of its local competitors as benchmarks against which to measure whether it is engaging in improper cost allocation. Thus the distinction drawn by Congress seems quite understandable without resort to inferences of punitive purpose.

The third device for identifying a punishment focuses on legislative intent, and in practice appears to differ from the second only in inviting a journey through legislative history. On this point we can be brief. BellSouth simply has not come forward with the kind of "unmistakable evidence of punitive intent which ... is required before a Congressional enactment of

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[10] While in 1993 we somewhat disparaged the distinction then drawn between GTE and the BOCs on the basis of relative dispersion, *United States v. Western Electric Co.*, 993 F.2d at 1579, we did so solely with respect to the claim of discrimination against competing providers. Our reasoning was that the BOCs could not easily sort out information services transmissions, or intra-corporate transmissions, on the customer end of a call, as they would have to do in order to discriminate efficiently. *Id.* That deficiency would not seem to impede cost-shifting, where the regulated monopoly attempts to deceive regulators about which costs belong in the regulated enterprise and which in the other.

this kind may be struck down" as an attainder. *Selective Service System,* 468 U.S. at 855-56 n. 15, 104 S.Ct. at 3357 n. 15 (quoting *Flemming v. Nestor,* 363 U.S. 603, 619, 80 S.Ct. 1367, 1377, 4 L.Ed.2d 1435 (1960)). Aside from a few scattered remarks referring to anticompetitive abuses allegedly committed by the BOCs in the past, BellSouth has provided no legislative history even touching on the purposes behind § 274, much less presenting "smoking gun" evidence of congressional vindictiveness.

In sum, we hold that § 274 is not a bill of attainder.

First Amendment Challenge

BellSouth complains that § 274 abridges its constitutional right of free speech by restricting its ability to provide electronic publishing. Clearly the structural separation requirements regulate expressive activity within the scope of the First Amendment. So, as is often the case in the First Amendment arena, the parties devote much of their energy toward disputing the appropriate standard of review. BellSouth argues that § 274 warrants strict scrutiny for two reasons: first, because it singles out named corporations for speech restrictions, and second, because it is content-based. The FCC says that § 274 is a content-neutral regulation and should instead be evaluated under the intermediate standard of review applied by the Supreme Court in its decisions upholding the cable television "must-carry" rules. See *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) ("*Turner I*") (determining that intermediate scrutiny applied); *Turner Broadcasting System, Inc. v. FCC,* 520 U.S. 180, ---, 117 S.Ct. 1174, 1186, 137 L.Ed.2d 369 (1997) ("*Turner II*") (upholding must-carry provisions under intermediate scrutiny). We agree with the FCC that an intermediate level of scrutiny is appropriate.

We begin with BellSouth's claim that § 274 warrants strict First Amendment review because it targets named corporations. In support of this claim BellSouth cites our decision in *News America Publishing, Inc. v. FCC,* 844 F.2d 800 (D.C.Cir.1988). That case concerned a provision that prohibited the FCC from granting extensions of temporary waivers of the newspaper/television cross-ownership rules to all then-current holders of such temporary waivers--a class of one, as it turned out. We struck down the provision on First Amendment and equal protection grounds, noting that "[w]here legislation affecting speech appears underinclusive, i.e., where it singles out some conduct for adverse treatment, and leaves untouched conduct that seems indistinguishable in terms of the law's ostensible purpose, the omission is bound to raise a suspicion that the law's true target is the message." *Id.* at 804-05. Contrary to BellSouth's assertion, however, *News America* does not stand for the proposition that statutes singling out particular persons for speech restrictions automatically merit strict scrutiny. In fact we chose among standards only to the extent of saying that the provision could not survive any standard of review more exacting than a rational basis test. *Id.* at 802, 814.

Only marginally more promising for BellSouth are the Supreme Court's decisions in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue,* 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983), and *Arkansas Writers' Project v. Ragland,* 481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987). In both cases the Court applied strict scrutiny to invalidate state tax laws that had the effect of disproportionately burdening certain segments of the press. In *Minneapolis Star,* because the challenged use tax exempted the first $100,000 in ink and paper consumed by a publication in a given year, its burden was borne by fewer than one in twenty newspapers in the state, with two-thirds of it landing on one publisher alone. 460 U.S. at 578-79, 103 S.Ct. at 1368-69. The sales tax struck down in *Arkansas Writers' Project* appeared to spread its net more broadly,

covering general interest magazines but exempting newspapers and religious, professional, trade, and sports magazines. 481 U.S. at 224, 107 S.Ct. at 1725. In fact, however, "the magazine exemption mean[t] that only a few Arkansas magazines pa[id] any sales tax," giving the tax a targeting effect comparable to that of the *Minneapolis Star* tax. *Id.* at 229, 107 S.Ct. at 1727-28. The Supreme Court has explained the two cases as meaning only that strict scrutiny must be applied to regulations that target a small subset of media organizations in ways that threaten to "distort the market for ideas." *Turner I,* 512 U.S. at 660, 114 S.Ct. at 2468 (quoting *Leathers v. Medlock,* 499 U.S. 439, 448, 111 S.Ct. 1438, 1444, 113 L.Ed.2d 494 (1991)). The Court has expressly declined to draw the broad lesson "that the First Amendment mandates strict scrutiny for any speech regulation that applies to one medium (or a subset thereof) but not others." *Turner I,* 512 U.S. at 660, 114 S.Ct. at 2468.[11]

News America, Minneapolis Star, and *Arkansas Writers' Project* all featured some suggestion that the legislature's differential treatment of speakers was motivated by the content of their speech. See *Turner I,* 512 U.S. at 660, 114 S.Ct. at 2468 ("Although there was no evidence that an illicit governmental motive was behind either of the taxes, both were structured in a manner that raised suspicions that their objective was, in fact, the suppression of certain ideas.").[12] It is that suggestion, rather than the act of "singling out" by itself, that triggers strict First Amendment scrutiny, as *Turner I* made clear. See *id.* at 658, 114 S.Ct. at 2467 ("[S]peaker-based laws demand strict scrutiny when they reflect the Government's preference for the substance

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[11] In a similar vein, we have described *Minneapolis Star* and *Arkansas Writers' Project* as "likely addressed only to the special complexities of taxation." *Walsh v. Brady,* 927 F.2d 1229, 1236 (D.C.Cir.1991).

[12] In fact, the tax exemption challenged in *Arkansas Writers' Project* facially excluded certain publications on the basis of their content, rendering it especially suspect. 481 U.S. at 229-30, 107 S.Ct. at 1727-28.

of what the favored speakers have to say (or aversion to what the disfavored speakers have to say).").

Here, there is no indication that § 274's coverage was limited to the BOCs because of any concern about the content of their speech--no indication, in other words, that "the legislature's speaker preference reflects a content preference." *Id.* "So long as they are not a subtle means of exercising a content preference, speaker distinctions of this nature are not presumed invalid under the First Amendment." *Id.* at 645, 114 S.Ct. at 2460-61. In addition, *Turner I* held that "heightened scrutiny is unwarranted when the differential treatment is 'justified by some special characteristic of' the particular medium being regulated." *Id.* at 660-61, 114 S.Ct. at 2468 (quoting *Minneapolis Star,* 460 U.S. at 575, 103 S.Ct. at 1366-67). Congress's imposition of structural separation on the BOCs because of their status as price-regulated bottleneck monopolies is certainly no more suggestive of any effort to exercise a content preference than were the must-carry provisions upheld in *Turner,* see *Turner I,* 512 U.S. at 661, 114 S.Ct. at 2468 (identifying "bottleneck monopoly power" held by cable operators as a special characteristic of the cable medium).

We turn next to BellSouth's claim that § 274 is expressly formulated in terms of content, and thus requires strict scrutiny. To be sure, § 274 defines the field of expression to which it applies by reference to a set of categories that might in a formal sense be described as content-based. Thus it covers items such as "news," "entertainment," and "research material," and exempts information such as "video programming," "voice messaging," and "data processing." See § 274(h)(1).

Nothing about the provision, however, suggests an underlying purpose to favor or disfavor particular viewpoints, nor does BellSouth advance such a suggestion. The Supreme Court has held that statutes lacking such a purpose are likely to be deemed

content-neutral. "[L]aws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral." *Turner I,* 512 U.S. at 643, 114 S.Ct. at 2459. Indeed the very breadth of § 274's categories undermines any claim that Congress adopted a categorical approach out of a desire to favor any particular viewpoint or idea. Further, to a large extent neutrality is now gauged by reference to a statute's justifications: "Government regulation of expressive activity is content neutral so long as it is *justified* without reference to the content of the regulated speech." *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 2753, 105 L.Ed.2d 661 (1989) (emphasis in original) (citation omitted). The goal of remedying bottleneck problems is independent of content and viewpoint.

In summary, then--despite BellSouth's twin contentions that § 274 favors certain speakers, and certain types of speech, over others--we hold that intermediate scrutiny is appropriate because here, perhaps even more than in *Turner,* there is simply no hint that "the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Turner I,* 512 U.S. at 642, 114 S.Ct. at 2459 (quoting *Ward,* 491 U.S. at 791, 109 S.Ct. at 2754).

A regulation will be upheld under intermediate scrutiny "if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner II,* 520 U.S. at ----, 117 S.Ct. at 1186 (citing *United States v. O'Brien,* 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968)). The requirement of an important governmental interest is amply met here. The asserted interest underlying § 274 is to promote competition by discouraging discrimination and cross-subsidization by the BOCs. This is not only important, see *Turner I,* 512 U.S. at 644, 114 S.Ct. at 2460, but "unrelated to the suppression of free speech"; indeed, the interest in

preventing truly anticompetitive behavior in the electronic publishing marketplace is an interest in the enhancement of speech. Cf. *id.* at 663, 114 S.Ct. at 2469-70.

Under intermediate scrutiny, while the government obviously need not meet the most rigorous standard of "narrow tailoring," it must nonetheless "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* at 664, 114 S.Ct. at 2470. In determining whether the government has made this showing, we owe Congress's economic judgments considerable deference, so as not to "infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy." *Turner II,* 520 U.S. at ----, 117 S.Ct. at 1189; see also *id.* at ---- - ----, 117 S.Ct. at 1203-05 (Breyer, J., concurring) (deferring to Congress's non-economic objectives). Aside from noting the various executive branch (and judicial) positions taken in connection with removal of the MFJ's restriction, which bear no more weight here than in the bill of attainder analysis, see pp. ___ above, BellSouth does not claim that Congress's apparent concern about anticompetitive risks was unreasonable.

But it does complain that Congress could have guarded against these risks through less speech-restrictive methods, for instance by imposing non-structural safeguards such as accounting requirements. Intermediate First Amendment scrutiny, however, does not entail a "least restrictive means" analysis. See *Turner II,* 520 U.S. at ---- - ----, 117 S.Ct. at 1199-1200. It is at least plausible that structural separation will more effectively meet the perceived anticompetitive threat than would lesser restrictions, and although BellSouth characterizes the additional burden of structural separation as "enormous" (compared with, for example, special accounting rules), it offers neither detail nor quantitative evidence to support this characterization.

As in its bill of attainder attack, BellSouth points to the exclusion of GTE and other non-BOC local exchange carriers. But as we said in that connection, there are plausible reasons for the exclusion, and, just as BellSouth failed in that context to suggest a punitive purpose, here it equally fails to suggest any intent to favor non-BOCs' viewpoints over BOCs'. Moreover, since intermediate scrutiny demands that the government "not burden substantially more speech than necessary to further [its] interests," *Turner II*, 520 U.S. at ----, 117 S.Ct. at 1186, it would be odd to strike down a statute because Congress failed to restrict as much expression as it could have--presumably because of a judgment that the interest justifying a restriction in one context, though "important," was slightly less so than in the other and therefore, at the margin, outweighed by competing interests (including free speech). See *Walsh v. Brady*, 927 F.2d 1229, 1238-39 (D.C.Cir.1991) (Williams, J., concurring).

Finally, we note again that § 274 leaves each RBOC free to publish electronically, using the facilities of its BOC subsidiaries, either directly or through a subsidiary, so long as the acting corporation conforms to the statutory separation requirements. BellSouth argues that the separated affiliate mechanism is entirely irrelevant to the First Amendment question, since "[i]t hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him." *Arkansas Writers' Project*, 481 U.S. at 231, 107 S.Ct. at 1728 (internal quotations omitted). While undoubtedly true in the context of natural persons, this observation carries less weight in the context of controlled subsidiaries. The First Amendment does not normally permit the government to justify a prohibition on a corporation's speech by pointing to the fact that its shareholders remain free to express themselves without restriction; corporations exist in significant part to overcome precisely the sorts of collective action problems that the shareholders in that scenario would then face. But there is no collective action problem here. The investors in BellSouth

are free to use whatever portion of their pooled resources they wish for electronic publishing, subject only to the need for structural separation. This is not to say that structural separation requirements count as merely insubstantial burdens from a First Amendment perspective--they do not. Cf., e.g., *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 252-54, 107 S.Ct. 616, 624-26, 93 L.Ed.2d 539 (1986) (noting disclosure and record-keeping requirements entailed by corporation's use of segregated political contribution fund). But the fact that § 274 leaves RBOCs like BellSouth free to pursue electronic publishing strengthens our conclusion that s 274 does not restrict substantially more speech than necessary.

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The petition for review is

Denied.

SENTELLE, Circuit Judge, dissenting:

With respect to the First Amendment argument of the Bell operating companies ("BOCs"), I agree with the majority's analysis and with its conclusion. With respect to the bill of attainder claim, however, I agree with most of the majority's analysis; I simply conclude that it does not support the majority's conclusion.

The majority opinion sets forth the provisions of 47 U.S.C. § 274, and I will not rehash them here, beyond a brief summary to set the stage for my dissent. That section prohibits Bell operating companies, by name, and their affiliates, from engaging in the provision of a lucrative line of business on the same terms as competitors, potential competitors, or anyone else in the world. BellSouth argues that this provision constitutes legislative punishment for their past course of business conduct, and as such, runs afoul of Article I, section 9, clause 3 of the

Constitution, which provides that, "No Bill of Attainder or ex-post facto law shall be passed."

As the majority notes, while the term "Bill of Attainder" may have originally referred to parliamentary acts sentencing persons to death without a trial by the judiciary, Maj. Op. at __, the Supreme Court early held that the prohibition extends to legislative punishment of specified persons beyond capital punishment. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 3 L.Ed. 162 (1810). As the majority further notes, the court has developed a clearly identifiable bill-of-attainder jurisprudence under which "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution." *United States v. Lovett*, 328 U.S. 303, 315-16, 106 Ct.Cl. 856, 66 S.Ct. 1073, 1079, 90 L.Ed. 1252 (1946). As the majority reasons, the result of this progressive revelation of jurisprudence is that the prohibition against bills of attainder is "triggered when a legislative act meets two tests--first, that it apply with specificity, and second, that it impose punishment." Maj. Op. at __. I completely agree. What I do not understand about the majority opinion is why, having fully loaded its analysis with specificity and punishment, the majority is unable to pull the trigger in this case.

On its face, the legislation before us appears to fall squarely on the condemned side of this two-part test. Section 274 exhibits nearly unprecedented specificity, forbidding twenty named corporations, alone out of over 1,300 local exchange carriers, from entering a trade or business on the same terms as others. Of all the bill of attainder cases decided by the Supreme Court, in only one did a statute single out individuals by name, and that was deemed an unconstitutional bill of attainder. *See Lovett*, 328 U.S. 303, 66 S.Ct. 1073. And, as the Supreme Court has held, "legislative bars to participation by individuals or groups in

specific employments or professions" do indeed constitute punishment within the meaning of this test. *Selective Service System v. Minnesota Public Interest Research Group,* 468 U.S. 841, 852, 104 S.Ct. 3348, 3355, 82 L.Ed.2d 632 (1984). Absent the Supreme Court's decision in *Nixon v. Administrator of General Services,* 433 U.S. 425, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977), I think we would rule this an unconstitutional bill of attainder without going further.

Mere specificity may not make an act a bill of attainder, but in most cases the Court has required little more. The Court has described the Bill of Attainder Clause as the embodiment of a fundamental principle of separation of powers: "a legislature can provide that persons possessing certain characteristics must abstain from certain activities, but must leave to other tribunals the task of deciding who possesses those characteristics." *United States v. Brown,* 381 U.S. 437, 454 n. 29, 85 S.Ct. 1707 at 1718 n. 29, 14 L.Ed.2d 484 (1965). But *Nixon* precludes defining a bill of attainder solely in terms of its specificity. In that case, Congress acted against a single, named individual for disfavored treatment as compared to "all other Presidents or members of the Government." 433 U.S. at 470, 97 S.Ct. at 2804. After a herculean struggle, the Court concluded that the statute could be upheld because "appellant constituted a legitimate class of one...." *Id.* at 472, 97 S.Ct. at 2805. The majority upholding that statute included Justice Stevens, who noted in his separate concurrence that "[t]he very specificity of the statute would mark it as punishment, for there is rarely any valid reason for such narrow legislation; and normally the Constitution requires Congress to proceed by general rulemaking rather than by deciding individual cases." *Id.* at 485-86, 97 S.Ct. at 2814 (Stevens, J., concurring). Just so. And absent that *Nixon* decision, the theory advanced by *Brown* and echoed by Justice Stevens would in my view be an adequate basis for striking down the present legislation.

Nixon, of course, is a unique case. It involved a disgraced President of the United States who had, as Justice Stevens pointed out, "resigned his office under unique circumstances and accepted a pardon for any offenses committed while in office," thereby "plac[ing] himself in a different class from all other Presidents." *Id.* at 486, 97 S.Ct. at 2814. Despite my respect for the Supreme Court, I must say that this case may well be evidence of the classic statement that hard cases make bad law. The majority circumvented the apparent status of the statute, singling out one President by name, with an unconvincing analysis holding that the burden placed upon him was not a punishment. Chief Justice Burger's dissent, 433 U.S. at 536-45, 97 S.Ct. at 2837-42, noted the anomalous character of the decision legitimating a " 'class of one' ... under the Bill of Attainder Clause." *Id.* at 545, 97 S.Ct. at 2841. Without that decision, the analysis suggested by Justice Stevens would impel if not compel a decision that the statute before us runs afoul of that clause. The legislative imposition of a burden solely on a class of individuals defined by name rather than by characteristic (although not a class of one as in the case of *Nixon*) on its face bespeaks an intent to punish rather than to merely regulate. But still, the *Nixon* decision is a Supreme Court decision, and whether a good one or a bad one, it binds us. Because of that decision, and its convoluted analysis holding nonpunitive the unprecedented burdening of a "class of one," we must undertake a more careful analysis of "punishment" under the three-part test of *Selective Service System,* 468 U.S. 841, 104 S.Ct. 3348.

In what appears to have been an attempt to cabin its reasoning in *Nixon,* the Court in *Selective Service System* announced a three-part test to determine whether a statute imposes "punishment" for purposes of the Bill of Attainder Clause:

> (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, viewed in terms of the type and severity of burdens

> imposed, reasonably can be said to further nonpunitive legislative purposes; and (3) whether the legislative record evinces a congressional intent to punish.

Id. at 852, 104 S.Ct. at 3355 (internal punctuation omitted). This test leads inexorably to a conclusion that the statute before us is a bill of attainder. As to the first part of the test, even the majority must recognize that "legislative bars to participation by individuals or groups in specific employments or professions," *id.*, have constituted the most common sort of statutes struck down by the Court as unconstitutional bills of attainder. *Nixon* simply does not change this fact. The Court in *Nixon* distinguished the statute before it as nonpunitive--not only did the statute fail to inflict any harm previously held to be "forbidden deprivations," but its provision for " 'just compensation' ... undercut[ ] even a colorable contention that the Government has punitively confiscated appellant's property...." 433 U.S. at 475, 97 S.Ct. at 2806. Here, given the history of treating line-of-business restrictions as punishment, such an easy escape is not available.

Under *Selective Service,* we probably need go no further; nevertheless, analysis under the additional parts of that test support the conclusion that this statute is unconstitutional. The second prong asks "whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes." 468 U.S. at 852, 104 S.Ct. at 3355 (internal punctuation omitted). In my view, it cannot. The majority concludes that it can, stating: "apart from its specific targeting aspect, we find that § 274 has the earmarks of a rather conventional response to commonly perceived risks of anticompetitive behavior." Maj. Op. at __. While the latter portion of this statement may be true, I do not see how we can analyze the statute in terms "apart from its specific targeting aspect." The statute does not address the characteristics of local exchange carriers that create risks of anticompetitive behavior.

If it did, it would speak of those characteristics, which might well be shared by, for example, GTE or Sprint. *See Illinois Bell Tel. Co. v. FCC,* 740 F.2d 465, 476 (7th Cir.1984) (noting that even small LECs may have the "ability to abuse a monopoly position"). Then, whether or not a particular carrier possessed the relevant characteristics and therefore should be restricted would be subject to judicial determination. By naming the companies rather than describing the characteristics creating the risks, it seems apparent that Congress aimed, not at protecting present and future markets from potential abuse of monopoly power, but at punishing those named companies' *past* anticompetitive behavior. I agree with today's majority that the second factor "appears to be the most important of the three." Maj. Op. at _. I cannot, however, agree with the majority that it cuts against the characterization of section 274 as a bill of attainder.

I further conclude that the third factor, which I deem the least important, also supports classifying the statute as a bill of attainder. That factor requires us to examine "whether the legislative record evinces a congressional intent to punish." *Selective Service,* 468 U.S. at 852, 104 S.Ct. at 3355 (internal punctuation omitted). In my view it does. As the majority notes, "scattered remarks" in the legislative history "refer[ ] to anticompetitive abuses allegedly committed by the BOCs in the past...." Maj. Op. at __. While I find the very existence of the scattered remarks to be indicative of the punitive intent behind the statute, I do not find them conclusive. We have noted before that "[a]t its best, legislative history is an undependable guide to the meaning of a statute." *Gersman v. Group Health Ass'n, Inc.,* 975 F.2d 886, 890 (D.C.Cir.1992). I suggest that it is no more dependable in ascertaining the motive behind the statute.

More instructive on congressional motivation than the scattered remarks is the timing and apparent triggering of the enactment. As the majority notes in its discussion of factor two,

Congress passed section 274 after the judiciary removed the information services prohibition from the modified final judgment. Maj. Op. at __. The reinstatement of that ban following its judicial removal to me bespeaks, indeed shouts, a motive on the part of the Article I branch to *reimpose* a burden on the parties before the court which the Article III branch found no longer appropriate. While I have no quarrel with the legitimacy of a congressional motive to correct what it sees as an improper application of legal protection against *future* conduct, when Congress defined the burdened class by name rather than by characteristic or future action, I can discern no other motive than an intent to react to (read "punish") the past conduct of those named persons. This, I suggest, violates the principle underlying Article I, section 9, clause 3, given short shrift by the majority.

That is, the prohibition against bills of attainder and *ex post facto* laws is an essential part of the Constitution's structural separation of powers among the three branches of government. As the majority's analysis suggests, that clause was designed to prevent punishment "without the benefit of a judicial trial." Maj. Op. at __. By way of comparison, in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995), the Supreme Court struck down as unconstitutional a congressional enactment "to the extent that it require[d] federal courts to reopen final judgments entered before its enactment." *Id.* at 240, 115 S.Ct. at 1463. While the statute before us does not literally run afoul of that prohibition, it partakes of the same sort of violation of separation of powers safeguards. That is, it does not simply regulate or prohibit future conduct or create a ban on the entry into a line of business based on risks of future anticompetitive behavior, but rather, it singles out for such a ban, such a burden, named entities. It is one thing for the legislature to attempt to protect competition by defining a standard against which the conduct of individuals can be measured. It is quite another for it to simply list the names of individuals who

Congress perceives as having uncontrollable monopolistic tendencies. This short-circuits the factfinding and due process protections of trial in an Article III court, and therefore runs afoul of the structural provisions embodied in the Constitution's Bill of Attainder Clause.

I would say in closing that the majority's discussion of the lightness of the burden, typified by the ways in which a BOC might restructure in order to get around it, goes only to the weight of the punishment, not its character as punishment. Thus, that part of the majority's reasoning does nothing to convince me that the statute can survive constitutional scrutiny.

APPENDIX B

In the Matter of Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services

CC Docket No. 96-152

FEDERAL COMMUNICATIONS COMMISSION

12 FCC Rcd 5361

RELEASE-NUMBER: FCC 97-35

February 7, 1997 Released; Adopted February 6, 1997; Comment Date April 4, 1997; Reply Comment Date April 25, 1997

ACTION: FIRST REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

By the Commission

I. INTRODUCTION

1. In February 1996, the "Telecommunications Act of 1996" became law.[1] The intent of the 1996 Act is "to provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and

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[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act), to be codified at 47 U.S.C. § 151 et seq. Hereinafter, all citations to the 1996 Act will be to the 1996 Act as it will be codified in the United States Code. The 1996 Act amended the Communications Act of 1934. We will refer to the Communications Act of 1934, as amended, as "the Communications Act" or "the Act."

services to all Americans by opening all telecommunications markets to competition."[2]

2. On July 18, 1996, the Commission released a Notice of Proposed Rulemaking ("Notice") regarding implementation of sections 260, 274, and 275 of the Communications Act addressing telemessaging, electronic publishing, and alarm monitoring services, respectively.[3] This Order implements the non-accounting requirements of sections 260 and 274. We address in separate proceedings the alarm monitoring provisions of section 275 and the enforcement issues related to sections 260, 274, and 275.[4] In addition, the accounting safeguards required to implement sections 271 through 276 and section 260 are addressed in a separate proceeding.[5]

3. The 1996 Act opens local markets to competing providers by imposing new interconnection, unbundling, and resale obligations on existing providers of local exchange services.[6] In enacting sections 260 and 274, Congress recognized that the

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[2] See Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) (Joint Explanatory Statement); see also 1996 Act, § 706(a), 110 Stat. 56 (encouraging the deployment of advanced telecommunications capability to all Americans).

[3] Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services, CC Docket No. 96-152. Notice of Proposed Rulemaking, FCC 96-310 (rel. July 18, 1996).

[4] See Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers, CC Docket No. 96-238. Notice of Proposed Rulemaking, FCC 96-460 (rel. Nov. 27, 1996) at P 62 ("Enforcement NPRM").

[5] See Implementation of the Telecommunications Act of 1996: Accounting Safeguards under the Telecommunications Act of 1996. CC Docket No. 96-150, Report and Order, FCC 96-490, (rel. Dec. 24, 1996) ("Accounting Safeguards Order").

[6] See 47 U.S.C. § 251.

local exchange market will not be fully competitive immediately. Congress therefore imposed requirements applicable to local exchange carriers' (LECs') provision of telemessaging services in section 260, and a series of requirements applicable to Bell Operating Companies' (BOCs') provision [5364] of electronic publishing services in section 274. Collectively, these requirements are designed to prevent, or facilitate the detection of, improper cost allocation, discrimination, or other anticompetitive conduct.

4. Section 260 permits incumbent LECs (including BOCs) to provide telemessaging service subject to certain nondiscrimination safeguards. Section 274 allows a BOC to provide electronic publishing service disseminated by means of its basic telephone service only through a "separated affiliate" or an "electronic publishing joint venture" that meets the separation, joint marketing, and nondiscrimination requirements in that section. BOCs that were offering electronic publishing services at the time the 1996 Act was enacted must comply with section 274 by February 8, 1997.[7] n7 As noted in part VIII, infra, the requirements of this Order will become effective 30 days after publication of a summary in the Federal Register. In addition, the collection of information contained in this Order is contingent upon approval by the Office of Management and Budget (OMB). Accordingly, we do not anticipate taking any enforcement action based on these requirements until they become effective. The requirements under section 274 expire on February 8, 2000.[8]

5. In this proceeding, our goal is to implement the non-accounting requirements in sections 260 and 274 in a manner that is consistent with the fundamental goal of the 1996 Act -- to open all telecommunications markets to robust

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[7] Id. § 274(g)(1).

[8] Id. § 274(g)(2).

competition. By fostering competition in these markets, we seek to produce maximum benefits for consumers of telemessaging and electronic publishing services.

II. SCOPE OF THE COMMISSION'S AUTHORITY

A. Electronic Publishing

1. Background

6. In the Notice, we sought comment on the extent to which section 274 grants the Commission authority over the intrastate provision of electronic publishing services.[9] We noted that section 274(b)(4) specifically refers to "such regulations as may be prescribed by the Commission or a State commission" for the valuation of BOC assets.[10] We therefore [5365] tentatively concluded that the Commission may not have exclusive jurisdiction over all aspects of intrastate services provided pursuant to section 274.[11]

7. In addition, apart from any intrastate jurisdiction conferred by section 274 itself, we sought comment on the extent to which the Commission may have the authority to preempt inconsistent state regulations with respect to matters addressed by section 274.[12]

2. Comments[13]

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[9] Notice at ¶ 23.

[10] Id.

[11] Id.

[12] Notice at ¶ 25 (citing Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, 375 n.4 (1986) (Louisiana PSC)).

[13] Parties that filed comments and replies are listed in the Appendix.

8. AT&T contends that section 274 covers both interstate and intrastate provision of electronic publishing services,[14] and that this section confers on the Commission general jurisdiction over the provision of intrastate electronic publishing services.[15] In support of its position, AT&T points to several sections that, in its view, refer to Commission authority over intrastate electronic publishing, including: (1) section 274(e), which authorizes the Commission to hear complaints for violations of section 274; (2) section 274(f), which requires all separated BOC affiliates engaged in electronic publishing to file reports with the Commission; and (3) section 274(c)(2)(C), which grants the Commission the authority to determine whether the BOCs may be authorized to have a greater financial control of a joint venture with small, local electronic publishers.[16] AT&T further maintains that the reference to valuation of BOC assets by state commissions in section 274(b)(4) does not restrict the Commission's general regulatory authority to establish rules, but merely indicates that, if a state commission has its own accounting rules, those rules should be applied to the extent they are not inconsistent with the Commission's rules.[17]

9. NAA contends that, because section 274 is silent with respect to whether it covers interstate or intrastate, and interLATA or intraLATA electronic publishing, and because electronic publishing services are not regulated telecommunications services, the Commission's authority under section 274 is limited to enforcing BOC compliance with the section's requirements that BOCs operate through a separated

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[14] AT&T at 9-10. We note also that NYNEX and YPPA contend that section 274 covers the provision of all electronic publishing services, both interLATA and intraLATA. See NYNEX at 4-5; YPPA at 2.

[15] AT&T at 10-11.

[16] Id.

[17] AT&T at 11-12.

affiliate or electronic publishing [5366] joint venture and make various filings and reports.[18] NAA further asserts that the Commission has authority to adjudicate complaints and requests for cease and desist orders with respect to violations of section 274, whether interstate or intrastate, but that states are not precluded from also enforcing this law.[19] NAA also contends that states should be allowed to continue to use their cost allocation procedures for intrastate purposes.[20]

10. A number of BOCs and state commissions, on the other hand, argue that section 274 does not give the Commission authority over intrastate electronic publishing services.[21] Some of these commenters argue that section 274 covers such intrastate services, but that this section does not divest the states of their authority over intrastate services under section 2(b) of the Communications Act.[22] These latter commenters argue that section 274 contains new requirements that state commissions will implement in their traditional role of regulating intrastate electronic publishing services.[23]

11. These BOCs and state commissions also argue that section 2(b) of the Communications Act and section 601(c) of the 1996 Act bar the Commission from exercising authority under section 274 with respect to intrastate electronic publishing services absent an express grant of authority from Congress.[24]

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[18] NAA at 2-3.

[19] Id.

[20] Id.

[21] Ameritech at 4; Bell Atlantic at 2-4; BellSouth at 7-8; California Commission at 6-8; New York Commission at 2; PacTel at 4-5.

[22] Ameritech at 6-7; Bell Atlantic at 4.

[23] Id.

[24] Ameritech at 6; Bell Atlantic at 3; BellSouth at 7-8; BellSouth Reply at

PacTel and Ameritech contend that such a grant of authority is provided in section 274 in limited circumstances, including receiving BOC filings, prescribing regulations to value BOC asset transfers, and acting on complaints and applications for cease-and-desist orders.[25] The California Commission argues that, although section 274(e) clearly supports our jurisdiction over complaints alleging violations of section 274, that section does not preclude states from trying to resolve disputes prior to the filing of a complaint or lawsuit in the federal arena.[26] n26 BellSouth disputes even this limited grant of authority over intrastate electronic publishing services, arguing that section 274(e) does not [5367] give the Commission either explicit or implicit statutory jurisdiction over intrastate electronic publishing services.[27]

12. Several BOCs and state commissions claim that the Commission may preempt state regulations and exercise jurisdiction over intrastate electronic publishing only to the extent that such services are inseparably mixed interstate-intrastate communications, pursuant to the standard set forth in Louisiana PSC.[28] The New York and California Commissions further argue that the Commission currently has no basis to make the showing necessary to preempt state regulation of intrastate electronic publishing.[29]

3-4; California Commission at 7.

[25] Ameritech at 5-6; PacTel at 4-5.

[26] California Commission at 8.

[27] BellSouth at 8.

[28] Bell Atlantic at 3-4; BellSouth at 8; BellSouth Reply at 3-4; California Commission at 8-9; New York Commission at 4-5; see also Louisiana PSC, 476 U.S. at 375 n.4.

[29] BellSouth Reply at 3-4; California Commission at 8-9; New York Commission at 7-8.

13. AT&T and MCI contend that the Commission retains the authority to preempt state regulatory requirements relating to electronic publishing that are inconsistent with its policies and rules.[30] AT&T further argues that, because the interstate and intrastate aspects of electronic publishing cannot be separated, the Commission's jurisdiction over interstate electronic publishingservices extends to such intrastate services as well.[31]

3. Discussion

14. As discussed above, in the Notice, we tentatively concluded that the Commission may not have exclusive jurisdiction over all aspects of intrastate services provided pursuant to section 274, based on the language of section 274(b)(4).[32] This section provides that BOCs and their separated affiliates or electronic publishing joint ventures must "value any assets that are transferred . . . and record any transactions by which such assets are transferred, in accordance with such regulations as may be prescribed by the Commission or a State commission to prevent improper cross subsidies."[33] After examining the language of the statute and the comments filed in this proceeding, we conclude, for the reasons set forth below, that the Commission's authority under section 274 applies to the provision of intrastate as well as interstate electronic publishing services. We conclude, therefore, that while states may impose regulations with respect to BOC provision of electronic publishing services, those regulations must not be inconsistent with section 274 and the Commission's rules [5368] thereunder. We emphasize, however, that the scope of the Commission's

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[30] AT&T Reply at 9-10; MCI at 3.

[31] AT&T Reply at 9-10.

[32] Notice at ¶ 23.

[33] 47 U.S.C. § 274(b)(4).

authority under section 274 extends only to matters covered by that section.

15. Thus, we agree with AT&T and Bell Atlantic that section 274 applies not only to the provision of interstate electronic publishing services, but also to such services when they are provided on an intrastate basis.[34] The language in section 274 expressly demonstrates that Congress intended this section to reach intrastate electronic publishing services. For example, section 274(c)(2)(C) expressly limits the permissible participation of a BOC or affiliate in electronic publishing joint ventures to an interest of 50 percent or less, but also provides that, "in the case of joint ventures with small, local electronic publishers, the Commission for good cause shown may authorize [a BOC] or affiliate to have a larger equity interest."[35] Notwithstanding the local nature of small, local electronic publishers,[36] which suggests that they provide intrastate services, this section confers authority on the Commission to determine whether BOCs may have a greater interest in electronic publishing joint ventures with such electronic publishers.

16. In addition, section 274 requires that a BOC or BOC affiliate engage in the provision of electronic publishing services disseminated by means of that BOC or its affiliate's "basic telephone service" only through a "separated affiliate" or an electronic publishing joint venture."[37] The statute defines "basic telephone service" to mean "any wireline telephone exchange

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[34] AT&T at 9-10; Bell Atlantic at 4.

[35] 47 U.S.C. § 274(c)(2)(C).

[36] We note, for example, that the legislative history of this provision indicates that "small, local electronic publishers" was intended to apply to publishers serving communities of fewer than 50,000 persons. See discussion infra ¶¶ 171, 175.

[37] See 47 U.S.C. § 274(a).

service, or wireline telephone exchange service facility ...."[38] The term "telephone exchange service." as defined in section 3(47), is a primarily intrastate service.[39] As we noted in the Accounting Safeguards Order, these references to primarily intrastate services clearly indicate that the scope of section 274 encompasses intrastate matters.[40]

[5369] 17. We further conclude that, given the jurisdiction granted by section 274, the Commission also has jurisdiction under the Communications Act to establish rules applicable to intrastate electronic publishing services. Sections 4(i), 201(b), and 303(r) of the Act authorize the Commission to adopt any rules it deems necessary or appropriate in order to carry out its responsibilities under the Act, so long as those rules are not otherwise inconsistent with the Act.[41] Nothing in section 274 bars the Commission from clarifying and implementing the requirements of section 274. Moreover, courts repeatedly have held that the Commission's general rulemaking authority is "expansive" rather than limited.[42] In addition, it is well-established that an agency has the authority to adopt rules to administer congressionally mandated requirements.[43]

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[38] Id. § 274(i)(2).

[39] Id. § 153(47).

[40] See Accounting Safeguards Order at ¶ 39 (finding that "telephone exchange service" and "basic telephone service" are primarily intrastate services, and that therefore section 274, among other sections, expressly reaches intrastate services).

[41] See United States v. Storer Broadcasting Co., 351 U.S. 192, 202-03 (1956).

[42] National Broadcasting Co. v. United States, 319 U.S. at 190, 219 (1943); see also FCC v. National Citizens Comm. for Broadcasting. 436 U.S. 775, 793 (1978).

[43] See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984); Morton v. Ruiz, 415 U.S. 199, 231 (1974) (holding that "the

18. Our conclusion that the Commission has jurisdiction under the Communications Act to establish rules applicable to the full scope of section 274, including intrastate electronic publishing services, is particularly appropriate where, as here, the Commission is authorized to adjudicate complaints alleging violations of section 274.[44] Section 274(e) provides a private right of action to any person claiming that an act or practice of a BOC, affiliate, or separated affiliate has violated any requirement of section 274.[45] Under section 274(e)(1), such person may file a complaint with the Commission or bring suit in a U.S. District Court as provided in section 207.[46] In addition to damages, section 274(e)(2) permits an aggrieved person to apply to the Commission for a cease-and-desist order or to a U.S. District Court for an injunction or an order compelling compliance.[47] We find that it serves [5370] the public interest for us to clarify in advance the section 274 requirements imposed on the BOCs that parties may ask us to enforce later. Such clarification of the

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power of an administrative agency to administer a congressionally created... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress").

[44] See In re Permanent Surface Mining Regulation Litigation, 653 F.2d 514 (D.C. Cir.) (en banc), cert. denied. 454 U.S. 822 (1981); National Petroleum Refiners Ass'n. v. FTC, 482 F.2d 672 (D.C. Cir. 1973), cert. denied. 415 U.S. 951 (1974) (both cases concluding that an agency that has authority to enforce a section of a statute also has generalized rulemaking authority to interpret that section in a rulemaking).

[45] See 47 U.S.C. § 274(e).

[46] 47 U.S.C. § 274(e)(1). Section 207 states that "any person claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies." 47 U.S.C. § 207.

[47] 47 U.S.C. § 274(e)(2).

requirements will reduce uncertainty, aid BOCs and their affiliates in complying with the requirements of section 274, and facilitate the prompt resolution of compliance disputes that may be presented in complaint proceedings.[48]

19. We reject the argument that section 2(b) of the Communications Act requires the conclusion that section 274, and the Commission's authority thereunder, apply only to the provision of interstate electronic publishing services. As demonstrated, for example, by section 274(c)(2)(C)'s grant of authority to the Commission to alter the maximum interest that a BOC may hold in electronic publishing joint ventures with small, local electronic publishers, Congress gave the Commission intrastate jurisdiction without amending section 2(b).[49] Thus, we find that, in enacting section 274 after section 2(b), and squarely addressing therein the issues before us by using the statutory language discussed above, Congress intended for section 274 to take precedence over any contrary implications based on section 2(b).[50]

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[48] See Enforcement NPRM (seeking comment on proposals to improve the speed and effectiveness of the formal complaint process).

[49] See also Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended. CC Docket No. 96-149. Report and Order and Further Notice of Proposed Rulemaking, FCC 96-489 (rel. Dec. 24, 1996) at ¶ 41 (discussing a number of other statutory examples where Congress, in enacting the 1996 Act, gave the Commission intrastate jurisdiction without amending section 2(b)) (Non-Accounting Safeguards Order).

[50] See, e.g., Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992) ("it is a commonplace of statutory construction that the specific governs the general"); see also 2 J. Sutherland, Statutory Construction § 22.34 (6th ed.) (where amended and original sections of a statute cannot be harmonized, the new provisions should prevail as the latest declaration of legislative will); American Airlines, Inc. v. Remis Industries, Inc., 494 F.2d 196, 200 (2d Cir. 1974).

20. We similarly are not persuaded that section 601(c) of the 1996 Act evinces an intent by Congress to preserve states' authority over intrastate matters arising under section 274. Section 601(c) of the 1996 Act provides that the Act and its amendments "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments."[51] As discussed above, we conclude that section 274 expressly modifies federal law, and the Commission's statutory authority thereunder, to reach intrastate electronic publishing services.

[5371] B. Telemessaging

1. Background

21. In the Notice, we sought comment on the extent to which section 260 grants the Commission statutory authority over the intrastate provision of telemessaging services.[52] We stated that telemessaging is an information service that, when provided by a BOC or its affiliate on an interLATA basis, is subject to the requirements of section 272 in addition to the requirements of section 260.[53] We also noted that, in the Non-Accounting Safeguards NPRM,[54] we tentatively concluded that the Commission's authority under sections 271 and 272 applies to interstate and intrastate interLATA information services

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[51] 1996 Act, § 601(c)(1), 110 Stat. 56, 143 (to be codified as a note following 47 U.S.C. § 152).

[52] Notice at ¶¶ 19-20.

[53] Id. at ¶ 19.

[54] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended. CC Docket No. 96-149. Notice of Proposed Rulemaking, FCC 96-149 (rel. July 18, 1996) (Non-Accounting Safeguards NPRM).

provided by BOCs or their affiliates.[55] Further, we pointed out that section 260 applies not only to BOCs and their affiliates, but also to all incumbent LECs.[56] Finally, apart from any intrastate jurisdiction conferred by section 260 itself, we sought comment in the Notice on the extent to which the Commission may have the authority to preempt inconsistent state regulations with respect to matters addressed by section 260.[57]

2. Comments

22. AT&T, ATSI, and Voice-Tel contend that section 260, and the Commission's authority thereunder, apply to all telemessaging services provided by incumbent LECs, including interstate and intrastate, as well as interLATA and intraLATA, telemessaging services.[58] ATSI contends that any attempt to limit the applicability of section 260 would deny providers of telemessaging a remedy against anticompetitive practices that Congress intended to provide them.[59] AT&T further contends that section 260 is an independent grant of authority to the Commission and is not restricted in any way by sections 271 and 272. [5372] Rather, AT&T contends that sections 271 and 272 complement section 260 by imposing additional requirements on the BOCs.[60]

23. Some BOCs and state commissions, on the other hand, argue that section 2(b) of the Communications Act and section 601(c) of the 1996 Act bar the Commission from exercising

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[55] Notice at ¶ 19.

[56] Id. at ¶ 20.

[57] Id. at ¶ 21 (citing Louisiana PSC, 476 U.S. at 375 n.4).

[58] ATSI at 4; ATSI Reply at 2; AT&T at 5; Voice-Tel at 7-8.

[59] ATSI at 4.

[60] AT&T at 6.

authority under section 260 with respect to any intrastate telemessaging services absent an express grant of authority from Congress.[61] Some of these commenters contend that nothing in section 260 gives the Commission authority over any intrastate telemessaging services.[62] Ameritech argues that section 260 grants the Commission limited jurisdiction over both interLATA and intraLATA telemessaging services, but only to the extent necessary to adjudicate complaints by other telemessaging providers that an incumbent LEC has improperly subsidized its telemessaging services or discriminated against other telemessaging services in violation of section 260.[63] BellSouth argues that, although sections 271 and 272 give the Commission limited reach over intrastate interLATA telemessaging services, such jurisdiction is not comprehensive and does not reach intrastate intraLATA telemessaging services.[64]

24. Several BOCs and state commissions claim that the Commission may preempt state regulations and exercise jurisdiction over intrastate telemessaging services only subject to the Louisiana PSC[65] exception for inseparably mixed interstate-intrastate communications.[66] The New York Commission and BellSouth further argue that the Commission currently has no basis to make the showing necessary to preempt

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[61] Ameritech at 5-6; Bell Atlantic at 3; BellSouth at 4-5; California Commission at 3-4; New York Commission at 2.

[62] Bell Atlantic at 3; California Commission at 4; New York Commission at 2.

[63] Ameritech at 5.

[64] BellSouth at 5-6.

[65] Louisiana PSC, 476 U.S. at 375 n.4.

[66] Bell Atlantic at 3; BellSouth at 6; BellSouth Reply at 3-4; California Commission at 4-5; New York Commission at 2.

state regulation of intrastate telemessaging services.[67]

25. AT&T, MCI, and Voice-Tel contend that the Commission has authority to preempt state regulatory requirements relating to telemessaging services that are inconsistent [5373] with its policies and rules.[68] Voice-Tel and AT&T further argue that, because the interstate and intrastate aspects of telemessaging services cannot be separated, the Commission's jurisdiction over interstate telemessaging services extends to such intrastate services as well.[69]

26. Cincinnati Bell argues that the Commission should preempt state regulations that restrict the ability of small and mid-sized incumbent LECs to provide telemessaging services on an integrated basis.[70]

3. Discussion

27. For the reasons set forth below, we conclude that section 260, and the Commission's authority thereunder, apply to the provision of intrastate as well as interstate telemessaging services. Consequently, we find that section 2(b) of the Communications Act does not bar the Commission from establishing regulations to clarify and implement the requirements of section 260 that apply to intrastate services. We conclude, therefore, that the rules we may establish to implement section 260 are binding on the states, and that the states may not impose regulations with respect to incumbent LEC provision of telemessaging services that are inconsistent with section 260 and

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[67] BellSouth at 6-7; BellSouth Reply at 3-4; New York Commission at 2.

[68] ATSI at 5; AT&T at 6 n.3: AT&T Reply at 4; MCI at 3; Voice-Tel at 7-8.

[69] ATSI at 5; AT&T Reply at 4; Voice-Tel at 7-8.

[70] Cincinnati Bell at 7-8.

the Commission's rules thereunder.

28. In the Non-Accounting Safeguards Order, we concluded that telemessaging is an information service that, when provided by a BOC or its affiliate on an interLATA basis, is subject to the requirements of section 272.[71] We further concluded that section 272 applies to both intrastate and interstate interLATA information services.[72] We have therefore already concluded that the Commission has jurisdiction over certain aspects of intrastate telemessaging services.

29. Section 260 not only imposes additional obligations on BOCs to prevent unlawful subsidization, and discrimination in favor, of its telemessaging service, but also extends its requirements beyond BOCs and their affiliates to all incumbent LECs. We conclude that section 260 applies to the provision of all telemessaging services by incumbent LECs, whether interstate or intrastate, and for BOCs, whether interLATA or intraLATA. This conclusion is supported by the terms of the statute. Specifically, section 260 prohibits an incumbent LEC from, among other things, subsidizing its telemessaging service from its " [5374] telephone exchange service or its exchange access."[73] "Telephone exchange service," as defined in section 3(47), is a primarily intrastate service.[74] As we noted in the Accounting Safeguards Order, this reference to a primarily intrastate service clearly indicates that the scope of section 260 encompasses intrastate matters.[75]

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[71] Non-Accounting Safeguards Order at ¶ 145.

[72] Id. at ¶ 30.

[73] 47 U.S.C. § 260(a)(1).

[74] Id. § 153(47).

[75] See Accounting Safeguards Order at ¶ 39 (finding that "telephone exchange service" is primarily an intrastate service, and that therefore section 260, among other sections, expressly reaches intrastate services).

30. We reject BellSouth's argument that section 260 does not apply to intrastate intraLATA services. As discussed below,[76] n76 section 260, unlike section 272, does not make a distinction between interLATA and intraLATA services. Moreover, the terms in section 260 encompass both interLATA and intraLATA services.

31. We further conclude that, given the jurisdiction granted by section 260, the Commission also has jurisdiction under the Communications Act to establish rules applicable to intrastate telemessaging services. As noted above, sections 4(i), 201(b), and 303(r) of the Act authorize the Commission to adopt any rules it deems necessary ~~or appro~~priate to carry out its responsibilities under the Act, so long as those rules are not otherwise inconsistent with the Act.[77] Nothing in section 260 bars the Commission from clarifying and implementing the requirements of this section.

32. Our conclusion that the Commission has jurisdiction to establish rules applicable to intrastate telemessaging services is particularly appropriate where, as here, the Commission exercises an adjudicatory function.[78] Section 260(b) requires that the Commission establish expedited procedures for the receipt and review of complaints alleging violations of the nondiscrimination provisions in section 260(a), or regulations adopted pursuant thereto, that result in "material financial harm" to a provider of telemessaging service.[79] As in our discussion of section 274 above,[80] we find that it serves the public interest for

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[76] See infra ¶ 210.

[77] See supra ¶ 17.

[78] See supra note 44.

[79] 47 U.S.C. § 260(b).

[80] See supra ¶ 18.

us to clarify in advance the section 260 requirements that are imposed on incumbent LECs and that parties may ask us to enforce later. Such clarifications will reduce uncertainty, aid incumbent LECs in complying with the requirements of section 260, and [5375] facilitate the prompt resolution of compliance disputes that may be presented in complaint proceedings.[81]

33. We reject the argument that section 2(b) of the Communications Act requires the conclusion that section 260, and the Commission's authority thereunder, apply only to the provision of interstate telemessaging services. Rather, as discussed above with respect to electronic publishing under section 274, we find that, in enacting section 260 after section 2(b), and squarely addressing therein the issues before us, Congress intended for section 260 to take precedence over any contrary implications based on section 2(b).[82]

34. We similarly are not persuaded that section 601(c) of the 1996 Act evinces an intent by Congress to preserve states' authority over intrastate matters arising under section 260. Section 601(c) of the 1996 Act provides that the Act and its amendments "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments."[83] As discussed above, we conclude that section 260 expressly modifies federal law, so that both federal law, and the Commission's authority thereunder, apply to both interstate and intrastate provision of telemessaging services.

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[81] See Enforcement NPRM (seeking comment on proposals to improve the speed and effectiveness of the formal complaint process).

[82] See supra ¶ 19.

[83] 1996 Act, § 601(c)(1), 110 Stat. 56, 143 (to be codified as a note following 47 U.S.C. § 152).

C. Constitutional Issues

35. BellSouth and U S WEST raise constitutional concerns with respect to our implementation of sections 260 and 274.[84] BellSouth contends that the Commission must be "circumspect" in its construction of sections 260 and 274 because both the separate affiliate requirement of section 272 that we proposed applying to BOCs' interLATA telemessaging services and the separated affiliate requirement of section 274 "impose impermissible prior restraints on BOCs' speech activities," in violation of the First Amendment.[85] Further, it maintains that sections 260 and 274, as well as other sections of the Act, are unconstitutional "bills of attainder" to the extent they single out BOCs by name and impose restrictions on [5376] them alone.[86] Recognizing that we have no discretion to ignore Congress' mandate to apply sections 260 and 274, BellSouth urges us to construe these sections, and others, narrowly.[87] U S WEST concurs with BellSouth and urges the Commission not to adopt

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[84] BellSouth at 2-3; U S WEST Reply at 2-3. These concerns were not raised in response to any inquiry in the Notice.

[85] BellSouth at 2-3.

[86] BellSouth states that singling out BOCs for specific treatment under the Act violates Articles I and III of the Constitution and specifically, the Bill of Attainder Clause, Art. I, § 9, cl.3. Id. Article I, § 9, applicable to Congress, provides, in relevant part, that "no Bill of Attainder or ex post facto Law shall be passed." A Bill of Attainder is a legislative act that applies "either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial." Black's Law Dictionary 150 (5th ed. 1979).

[87] For example, BellSouth states that since section 260 does not impose a separate affiliate requirement on BOCs' telemessaging operations, we should "avoid engrafting on such activities the constitutionally-infirm separate affiliate requirements of Section 272 for interLATA information services." BellSouth at 3.

any structural rules beyond the express terms of the statute.[88]

36. NAA, in reply, dismisses BellSouth's constitutional arguments.[89] It rejects as frivolous the argument that the electronic publishing safeguards are an unconstitutional prior restraint on BOCs' speech activities. It further states that the separated affiliate requirement (1) is a "reasonable approach to detecting and preventing cross-subsidy and discrimination that does not unnecessarily burden the BOCs' right to speak;" (2) does not violate the First Amendment because it expires four years after enactment of the Act and serves important government interests; and (3) is not a bill of attainder because BOCs are only singled out for "temporary, narrowly-focused, economic regulation."[90]

37. Although decisions about the constitutionality of congressional enactments are generally outside the jurisdiction of administrative agencies,[91] we have an obligation under Supreme Court precedent to construe a statute "where fairly possible to avoid substantial constitutional questions" and not to "impute to Congress an intent to pass legislation that is inconsistent with the Constitution as construed by the [Supreme Court]."[92] As BellSouth [5377] concedes, we have no discretion to ignore Congress' mandate respecting these sections or any

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[88] U S WEST Reply at 2-3 (contending that "FCC rules adding to these statutory restrictions -- especially if adopted as a matter of statutory interpretation, not public interest analysis -- would create a second violation of the Constitution").

[89] NAA's comments only address BellSouth's comments respecting the constitutionality of section 274. NAA Reply at 2-3.

[90] Id.

[91] See Johnson v. Robison, 415 U.S. 361, 368 (1974).

[92] United States v. X-Citement Video, 115 S. Ct. 464, 467, 469 (1994); see also Non-Accounting Safeguards Order at ¶ 279.

other sections of the Act.[93] Nevertheless, we find BellSouth's argument to be without merit.

38. With respect to section 274, we reject the argument that requiring BOCs to provide electronic publishing services through a separated affiliate violates the First Amendment. BellSouth bases its argument on an assertion that, as "content-related" services, electronic publishing services are commercial speech entitled to First Amendment protection.[94] We conclude that, to the extent that BOC provision of electronic publishing services constitutes speech for First Amendment purposes, the section 274 separated affiliate requirement neither prohibits the BOCs from providing such services, nor places any restrictions on the content of the information the BOCs may provide. Instead, the section 274 separated affiliate requirement is a content-neutral restriction on the manner in which BOCs may provide electronic publishing services that are disseminated by means of a BOC's basic telephone service.[95] These restrictions address the important governmental interest of protecting against improper cost allocation and discrimination by the BOCs, and they do so in a narrowly-tailored, content-neutral manner. Thus, we conclude that the separated affiliate requirement imposed by section 274 on BOC provision of electronic publishing services does not violate the First Amendment.

39. Similarly, we reject BellSouth and U S WEST's argument that section 274 is an unconstitutional "bill of attainder" because the statute singles out BOCs by name and imposes restrictions on

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[93] BellSouth at 2-3.

[94] Id. at 3.

[95] Content-neutral time, place, and manner restrictions that serve a substantial government interest are constitutionally permissible. See, e.g., City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, reh'g denied, 475 U.S. 1132 (1986).

them alone. We conclude that section 274 is not an unconstitutional bill of attainder simply because it applies only to the BOCs.[96] Rather, judicial precedent teaches that, in determining whether a statute amounts to an unlawful bill of attainder, we must consider whether the statute "furthers nonpunitive legislative purposes," and whether Congress evinced an intent to punish.[97] As noted above, the section 274 restrictions on BOC provision of electronic publishing services are temporary requirements aimed at protecting against improper cost allocation and discrimination by the BOCs. Moreover, we find no evidence, and BellSouth and US WEST have offered none, that would support a finding that Congress enacted section 274 to punish the BOCs. In fact, in enacting the 1996 Act, [5378] Congress freed BOCs from the terms of an antitrust consent decree.[98] Thus, we conclude that the section 274 restrictions imposed on BOCs do not violate the Bill of Attainder Clause.

40. With respect to section 260, BellSouth raises constitutional issues in this proceeding regarding the tentative conclusion in the Non-Accounting Safeguards NPRM that, under section 272, BOCs must provide interLATA telemessaging services through a separate affiliate.[99] We find no merit in

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[96] See Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 471-72 (concluding that the fact that a statute applies only to a limited group does not automatically offend the Bill of Attainder Clause).

[97] Selective Serv. Sys. v. Minnesota Public Interest Research Group, 468 U.S. 841, 852 (1984).

[98] See 1996 Act, § 601(a), 110 Stat. 56, 143 (to be codified as a note following 47 U.S.C. § 152).

[99] Non-Accounting Safeguards NPRM at P 54. Because the Non-Accounting Safeguards Order concluded that BOC provision of interLATA telemessaging services is an information service subject to the requirements of section 272, that order required BOCs that provide such services on an interLATA basis to do so through a separate affiliate. See Non-Accounting Safeguards Order at ¶ 145.

BellSouth's arguments for the same reasons discussed above and in the Non-Accounting Safeguards Order.[100]

III. BOC PROVISION OF ELECTRONIC PUBLISHING - SECTION 274

A. Definition of Electronic Publishing

1. Electronic Publishing Services under Section 274(h)

a. Background

41. Section 274(h)(1) defines "electronic publishing" as:

> the dissemination, provision, publication, or sale to an unaffiliated entity or person, of any one or more of the following: news (including sports); entertainment (other than interactive games); business, financial, legal, consumer, or credit materials: editorials, columns, or features; advertising; photos or images: archival or research material; legal notices or public records; scientific, educational, instructional, technical, professional, trade, or other literary materials: or other like or similar information.[101]

Section 274(h)(2) also lists specific services that are excluded from the definition of electronic publishing. These excepted services include, among other things, common carrier provision of telecommunications service, information access service, information gateway service, voice storage and retrieval, electronic mail, certain data and transaction processing services,

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[100] See Non-Accounting Safeguards Order at P 87 (finding that, to the extent that the separate affiliate requirement in section 272 restricts protected speech, it is a content-neutral restriction that does not violate the First Amendment).

[101] 47 U.S.C. § 274(h)(1).

[5379] electronic billing or advertising of a BOC's regulated telecommunications services, language translation or data format conversion, "white pages" directory assistance, caller identification services, repair and provisioning databases, credit card and billing validation for telephone company operations, E 911 and other emergency assistance databases, and video programming and full motion video entertainment on demand.[102]

42. In the Notice, we sought comment on how to distinguish the services that are properly included in the definition of electronic publishing in section 274(h)(1) from those services that are excluded under 274(h)(2). We asked parties to identify any enhanced services that BOCs currently provide that appear to meet the definition of an electronic publishing service under section 274. To the extent it is unclear whether a particular service, or a particular group of services, is encompassed by the statutory definition of electronic publishing, we invited parties to identify the basis for the ambiguity and to make recommendations on how the service, or services, should be classified.[103] For example, we cited the Non-Accounting Safeguards NPRM, which sought comment on whether we should classify as "electronic publishing" services those services for which the carrier "controls, or has a financial interest in, the content of the information transmitted by the service."[104]

43. In addition, we observed in the Notice that, although electronic publishing is specifically included in the definition of information services,[105] BOC provision of electronic publishing is explicitly exempted from the separate affiliate and

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[102] See 47 U.S.C. § 274(h)(2).

[103] Notice at ¶ 31.

[104] Id. at ¶ 29 n.41.

[105] 47 U.S.C. § 153(20).

nondiscrimination requirements of section 272 that apply to BOC provision of interLATA information services.[106] We noted that, in contrast to section 272, which applies only to BOC provision of interLATA information services, section 274 does not distinguish between the intraLATA and interLATA provision of electronic publishing services. We sought comment, therefore, on whether section 274 applies to BOC provision of both intraLATA and interLATA electronic publishing services.[107]

[5380] b. Comments

44. NAA asserts that the definition of electronic publishing in section 274(h) is clear and detailed; therefore, it contends, there is no need to anticipate ambiguous services at this time.[108] Other commenters agree that the definition of electronic publishing in section 274(h)(1) is clear, but suggest that Commission clarification of some of the exceptions to electronic publishing in section 274(h)(2) would be appropriate.[109] For example, several parties ask us to clarify that the "gateway" exception in section 274(h)(2)(C) includes access to a home page that electronically links selected Internet sites or other home pages. Similarly, they contend that introductory information regarding an Internet service provider's services and electronic linkage to these services should also be included in the "gateway" exception.[110] In addition, they contend that software

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[106] Id. § 272(a)(2)(C).

[107] Notice at ¶ 29.

[108] NAA at 3.

[109] See, e.g., Bell Atlantic at 4-5: Joint Parties at 3; NYNEX Reply at 12; USTA at 3.

[110] Joint Parties at 3-5; NYNEX Reply at 12-13; PacTel Reply at 5 n.7; SBC Reply at 6; USTA at 3; see also Ameritech at 9 (arguing that we should interpret the "gateway exception" in section 274(h)(2)(C) broadly); Bell Atlantic at 5.

browsers should be considered "navigational systems," which are also excluded from the definition of electronic publishing under section 274(h)(2)(C).[111] AT&T notes, however, that, even where particular BOC services are exempt from the requirements of section 274, the separate affiliate requirements of section 272 may still apply.[112]

45. Some commenters also ask us to clarify that BOC transmission of information that falls within the definition of electronic publishing under section 274(h)(1) does not make the BOC's transmission of such information subject to the requirements of section 274 unless the BOC has control of, or a financial interest in, the content of the information transmitted.[113] Those situations where a BOC merely provides access to another entity's content, they argue, should not be considered electronic publishing.

c. Discussion

46. We find, as the commenters indicate, that electronic publishing services may include services provided through the Internet or through proprietary data networks. We also find that, although the definition of electronic publishing in section 274(h) is quite detailed, clarification of the "gateway" exception of section 274(h)(2)(C) is appropriate. Section 274(h)(2)(C) provides that electronic publishing shall not include:
[5381]

> The transmission of information as part of a gateway to an information service that does not involve the generation or

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[111] Joint Parties at 3-5; NYNEX Reply at 12-13; SBC Reply at 6; USTA at 3.

[112] AT&T at 12; AT&T Reply at 10, n. 22.

[113] See NYNEX at 7-8; NYNEX Reply at 11-12; PacTel Reply at 4-5; SBC Reply at 5-6; YPPA at 2-3.

> alteration of the content of information, including data transmission, address translation, protocol conversion, billing management, introductory information content, and navigational systems that enable users to access electronic publishing services, which do not affect the presentation of such electronic publishing services to users.

We conclude, consistent with the comments on this issue, that a BOC's provision of access to introductory World Wide Web home pages, other types of introductory information, and software (such as browsers) does not constitute the provision of electronic publishing services under section 274(h)(2)(C). We find that, as long as a BOC merely provides access to a home page, or an initial screen that does not include any of the enumerated content types in section 274(h)(1), it is engaged in the provision of "gateway" services that section 274(h)(2)(C) excludes from the definition of electronic publishing services. Further, the statute expressly excludes "introductory information content" from the definition of electronic publishing services. Similarly, we find that end user software products, such as World Wide Web browsers, to the extent they enable users "to access electronic publishing services" and do not themselves incorporate the content types listed in section 274(h)(1), constitute "navigational systems" that are excepted from the definition of electronic publishing. Further, we conclude that hypertext "links,"[114] and other pointers, from any gateway or navigational system to electronic publishing content are similarly "navigational" systems and thus are not electronic publishing services under section 274(h)(1).

47. Moreover, we find that, to the extent BOCs engage in

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[114] A "hypertext link" is a reference from one document to another. On the World Wide Web, a user can select a link on one page and "jump" to a second page referenced by that link. See generally Wired Style: Principles of English Usage in the Digital Age (Hale ed., 1996) at 49-50.

activities that are excluded from the definition of electronic publishing under section 274(h), they are not subject to the joint marketing restrictions of section 274(c) with respect to those activities.[115] We find, however, that certain activities that are excluded from the definition of electronic publishing may still be information services subject to the separate affiliate, nondiscrimination, and joint marketing requirements of section 272. For example, although "gateway" services, as discussed above, are generally excluded from the definition of electronic publishing services, in the Non-Accounting Safeguards Order we found that certain BOC-provided Internet access services may be interLATA information services subject to the requirements of section 272.[116]

48. As to services that are neither expressly included nor excluded from the definition of electronic publishing, or services whose proper classification may be otherwise [5382] ambiguous, it would be speculative for us to determine at this time whether such services are electronic publishing services.[117] Rather, we find that the appropriate classification of an ambiguous service will necessarily involve a fact-specific analysis that is best performed on a case-by-case basis.[118] Moreover, we decline to adopt NAA's proposal that we rely solely on whether such service involves "the generation or alteration of the content of information."[119] Although we recognize that Congress used this

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[115] See, e.g., Joint Parties at 5.

[116] Non-Accounting Safeguards Order at ¶ 127.

[117] We note, for example, that the definition of electronic publishing in section 274(h)(1) includes "other like or similar information." 47 U.S.C. § 274(h)(1).

[118] This conclusion is consistent with the discussion of electronic publishing services in the Non-Accounting Safeguards Order. See Non-Accounting Safeguards Order at ¶ 140.

[119] NAA at 3; see also NYNEX Reply at 11-12.

language in describing several exceptions to the definition of electronic publishing, we do not find this fact to be dispositive in itself. There is no indication in section 274 or its legislative history that Congress intended the "generation or alteration" language to be the controlling factor in determining the nature of ambiguous services. We may, nevertheless, take it into consideration in any determination we make concerning the classification of an ambiguous service.

49. As to the electronic publishing services described in section 274(h)(1), we conclude, for the reasons discussed below, that a BOC must control, or have a financial interest in, the content of information transmitted over its basic telephone service in order to be subject to the requirements of section 274. We therefore agree with those parties that argue that a BOC is not subject to section 274 requirements merely because it provides the transmission component of an electronic publishing service offered by an unaffiliated entity to end users. We find support for our conclusion in two of the exceptions to the definition of electronic publishing -- section 274(h)(2)(B), which excepts from the definition of electronic publishing "the transmission of information as a common carrier," and section 274(h)(2)(M), which excludes "any other network service of a type that is like or similiar to these network services and that does not involve the generation or alteration of the content of information."[120] We note further that this "control or financial interest" test is consistent with the definition of electronic publishing in the Modification of Final Judgment (MFJ).[121] As

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[120] 47 U.S.C. §§ 274(h)(2)(B), (M).

[121] The MFJ, among other things, prohibited AT&T from engaging in electronic publishing over its own transmission facilities. It defined "electronic publishing" as the "provision of any information which AT&T or its affiliates has, or has caused to be, originated, authored, compiled, collected, or edited, or in which it has a direct or indirect financial or proprietary interest, and which is disseminated to an unaffiliated person

discussed below, however, because we received very few comments on the exact meaning of " [5383] control" and "financial interest," we are seeking additional comment on this issue in a Further Notice of Proposed Rulemaking ("Further Notice").[122]

50. Finally, we conclude that section 274 applies to a BOC's provision of both intraLATA and interLATA electronic publishing services. Nothing in the statute or its legislative history suggests that Congress intended to distinguish between intraLATA and interLATA electronic publishing services. We therefore agree with those commenters that argue that, if Congress had intended to distinguish between intraLATA and interLATA electronic publishing as it did in describing information services subject to section 272, it would have done so.[123]

2. Dissemination by Means of "Basic Telephone Service"

a. Background

51. Section 274 prescribes the terms under which a BOC may offer electronic publishing. Section 274(a) states that no BOC or BOC affiliate "may engage in the provision of electronic

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through some electronic means." See United States v. Western Electric, 552 F. Supp. 131, 180-81 (D.D.C. 1982) (emphasis added). aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983).

[122] See part VII, infra. In addition, we note that based on the record in the Non-Accounting Safeguards Order, we did not adopt a "control or financial interest" test in that proceeding for the purpose of determining whether ambiguous information services are subject to section 272 or section 274. See Non-Accounting Safeguards Order at ¶ 140. We stated, however, that the definition of electronic publishing could be further refined in the instant proceeding, as we are doing herein. Id.

[123] See, e.g., NAA at 3 n.2, NYNEX at 5; YPPA at 2.

publishing that is disseminated by means of such [BOC's] or any of its affiliates' basic telephone service, except that nothing in this section shall prohibit a separated affiliate or electronic publishing joint venture operated in accordance with this section from engaging in the provision of electronic publishing."[124] In the Notice, we tentatively concluded that a BOC or BOC affiliate may engage in the provision of electronic publishing services disseminated by means of a BOC or its affiliate's basic telephone service only through a "separated affiliate" or an "electronic publishing joint venture."[125]

b. Comments

52. No commenters disagree with our tentative conclusion that a BOC or BOC affiliate may engage in the provision of electronic publishing services disseminated by means of a BOC or its affiliate's basic telephone service only through a "separated affiliate" or an " [5384] electronic publishing joint venture."[126] The majority of BOCs point out, however, that electronic publishing not disseminated via the basic telephone service of a BOC or its affiliate is not subject to the requirements of section 274.[127] For example, PacTel maintains that a BOC or its affiliate may engage in the provision of electronic publishing service disseminated by means of telephone exchange service or facilities provided by a competitive wireline telephone service provider without having to create a separated affiliate or electronic publishing joint venture under section 274(a).[128]

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[124] 47 U.S.C. § 274(a).

[125] Notice at ¶ 32.

[126] See, e.g., MCI at 3-4; PacTel at 8. SBC Reply at 5; Time Warner at 8; U S WEST at 3; U S WEST Reply at 4.

[127] Ameritech at 7-8; Bell Atlantic Reply at 8; NYNEX at 6; PacTel at 8; SBC at 4.

[128] PacTel at 8.

53. Similarly, Ameritech asserts, and SBC agrees, that if a BOC only provides exchange access, and not basic telephone service, it is not subject to section 274 requirements.[129] For example, Ameritech contends that, if a BOC originates or terminates a toll call disseminating electronic publishing information, the BOC is providing "exchange access," not exchange service.[130] In response, AT&T asserts that "basic telephone service" under section 274 extends to any electronic publishing disseminated by means of either the BOC or its affiliate's local exchange service or local exchange facilities. This definition, AT&T argues, would include the exchange access service of a BOC or its affiliate.[131]

c. Discussion

54. We affirm our tentative conclusion that, pursuant to the plain language of section 274(a), a BOC or BOC affiliate may engage in the provision of electronic publishing services disseminated by means of a BOC or its affiliate's basic telephone service only through a "separated affiliate" or an "electronic publishing joint venture." Moreover, in reading section 274(a) together with the definition of "basic telephone service" in section 274(i)(2), we conclude that a BOC or BOC affiliate is not required to provide electronic publishing services through a separated affiliate or electronic publishing joint venture if it disseminates its electronic publishing via the basic telephone service of a competing wireline [5385] local exchange carrier or

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[129] Ameritech at 7-8; Ameritech Reply at 1-2; SBC Reply at 5.

[130] Thus, Ameritech argues, if a database used to provide the electronic publishing service is located outside the BOC's service territory and accessible only by the BOC's provision of exchange access, the BOC is not providing electronic publishing service subject to section 274. See Ameritech Reply at 1; SBC Reply at 5.

[131] AT&T Reply at 10-11.

commercial mobile radio service provider.[132] We find that dissemination via the basic telephone service of competing, unaffiliated providers significantly reduces the ability of the BOC to allocate costs improperly and to discriminate in favor of its affiliate.[133] We therefore decline to apply the requirement that a BOC provide electronic publishing services through a separated affiliate or electronic publishing joint venture where Congress did not. We also conclude that, with respect to electronic publishing services provided through the Internet, "dissemination" means the transmission of information via a BOC or its affiliate's basic telephone service to the Internet, rather than the transmission of information to the end user. Thus, a BOC that is providing Internet access services to end users, and nothing more, is not engaged in the provision of electronic publishing pursuant to section 274.

55. We reject Ameritech's assertion, however, that a BOC's dissemination of electronic publishing services through its exchange access service is exempt from the requirements of section 274. Pursuant to section 274(a), BOCs that provide electronic publishing services disseminated via their own "basic telephone service" must do so through a separated affiliate or electronic publishing joint venture. Section 274(i)(2) defines "basic telephone service" as "any wireline telephone exchange service, or wireline telephone exchange service facility, provided

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[132] Section 274(i)(2) expressly excepts from the definition of basic telephone service "a competitive wireline telephone exchange service provided in a telephone exchange area where another entity provides a wireline telephone exchange service that was provided on January 1, 1984" and "commercial mobile service." 47 U.S.C. §§ 274(i)(2)(A),(B).

[133] See generally Notice at ¶¶ 7.8 (arguing that, because of the BOCs' existing monopoly power in providing local exchange and exchange access service, they may potentially discriminate in the provision of such services and facilities to their competitors).

by a [BOC] in a telephone exchange area."[134] We find that, when a BOC provides exchange access service, it uses its telephone exchange service facilities. Indeed, "exchange access" is defined in section 153(16) as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services."[135] Since the definition of "basic telephone service" in section 274(i)(2) encompasses both the telephone exchange service and the exchange service facility, the use of exchange access service, which in turn uses the BOC's telephone exchange service facilities, for the dissemination of electronic publishing falls within this definition and must be provided in accordance with the requirements of section 274. This conclusion is appropriate as a matter of policy, too, since the BOCs' near-monopoly over exchange access service as well as local exchange service gives them an incentive to allocate costs improperly and discriminate against unaffiliated electronic publishing entities.[136]

[5386] 56. We conclude therefore that, to be engaged in the provision of electronic publishing services subject to section 274, the BOC must disseminate the information via its basic telephone service (as defined by 274(i)(2)) and have control of, or a financial interest in, the content of the information being provided. Similarly, we also conclude that control of, or a financial interest in, the content of the information alone, without BOC dissemination of information, is not electronic publishing under section 274.[137]

57. We note that, to the extent a BOC disseminates electronic

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[134] 47 U.S.C. § 274(i)(2) (emphasis added).

[135] Id. § 153(16) (emphasis added).

[136] See Notice at ¶¶ 7,8.

[137] See NYNEX at 6.

publishing services through the facilities of a competing wireline local exchange carrier, or commercial mobile service provider, and thus is not required to provide such services through a separated affiliate or electronic publishing joint venture, it may still be subject to the joint marketing prohibition of section 274(c)(1)(B). As discussed below, this section contemplates situations in which a BOC affiliate is involved in the provision of services that are "related to" the provision of electronic publishing, but does not provide electronic publishing services disseminated by means of a BOC or its affiliate's basic telephone service.[138]

B. "Separated Affiliate" and "Electronic Publishing Joint Venture" Requirements of Section 274

1. The "Operated Independently" Requirement of Section 274(b)

a. Background

58. Section 274(b) states that a separated affiliate or electronic publishing joint venture established to provide electronic publishing services pursuant to section 274(a) shall be "operated independently" from the BOC. Subsections 274(b)(1)-(9) then list nine structural separation and transactional requirements that apply to the separated affiliate or electronic publishing joint venture.[139] In the Notice we addressed only the structural separation requirements of section 274(b) and only those requirements are addressed herein.[140] Subsections 274(b)(1), (3), (4), (8), and (9) are transactional requirements that

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[138] See infra ¶¶ 120-122.

[139] 47 U.S.C. § 274(b).

[140] See Notice at ¶ 35, n.51.

are addressed in the Accounting Safeguards Order.[141] We observed in the Notice that the structural separation requirements of section 274(b) do not refer, in all instances, to both separated [5387] affiliates and electronic publishing joint ventures.[142] We, therefore, sought comment on whether Congress intended the phrase "operated independently" to have a different meaning for separated affiliates and for electronic publishing joint ventures.[143] We also sought comment in the Notice on whether the Commission should adopt additional regulatory requirements to ensure compliance with the "operated independently" requirement of section 274(b).[144]

b. Comments

59. Several commenters argue that Congress intended the phrase "operated independently" to have the same meaning for separated affiliates and electronic joint publishing ventures when subsections 274(b)(1)-(9) refer to both separated affiliates and electronic publishing joint ventures. They note, however, that some of the requirements of section 274(b) do not apply to electronic publishing joint ventures. Where the statutory language does not refer to both separated affiliates and electronic publishing joint ventures, these commenters maintain that the phrase "operated independently" should not be read to render all the requirements in subsections (b)(1)-(9) applicable to both separated affiliates and electronic publishing joint ventures; they contend, for example, that sections 274(b)(5) and 274(b)(7) are inapplicable to electronic publishing joint ventures since those

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[141] See Accounting Safeguards Order at ¶¶ 225-26, 240-44.

[142] Some of the subsections of section 274(b) refer only to a BOC and its separated affiliate, while others refer to a BOC and its separated affiliate or electronic publishing joint venture.

[143] Notice at ¶ 35.

[144] Id.

subsections refer only to separated affiliates.[145] Other commenters argue that the language "operated independently" compels us to apply all of the section 274(b) requirements to separated affiliates and electronic publishing joint ventures.[146]

60. As to the issue of whether we should adopt regulatory requirements to ensure compliance with the "operated independently" requirement of section 274(b), BOCs and several trade associations argue that the structural and transactional safeguards of section 274 are clear, self-executing and comprehensive. They assert that Congress could have expressly provided for additional requirements had it deemed them necessary to ensure the operational [5388] independence of BOCs from their separated affiliates and electronic publishing joint ventures.[147] They further assert that the phrase "operated independently" is not a separate substantive restriction, as their competitors maintain, but that subsections 274(b)(1)-(9) reflect Congress' determination of the requirements necessary to achieve operational independence.[148] Several of these commenters

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[145] Ameritech Reply at 10; AT&T at 13; Bell Atlantic at 5; Bell Atlantic Reply at 4-5; BellSouth at 11-12; BellSouth Reply at 11; NAA at 4; NYNEX at 8-9; NYNEX Reply at 4-5; PacTel at 9-10; PacTel Reply at 6; SBC at 5-6; USTA at 4.

[146] MCI at 4-5 (contending that section 274(b)(5) should be applied both to separated affiliates and electronic publishing joint ventures); Time Warner at 12 n.19, 14-15 (contending that both sections 274(b)(5) and (7) apply to separated affiliates and electronic publishing joint ventures); Time Warner Reply at 18-19.

[147] Ameritech Reply at 9; Bell Atlantic at 4-6: Bell Atlantic Reply at 4-5; BellSouth at 12-13; Joint Parties at 2 (contending, without specific reference to section 274(b), that section 274 is self-executing); NYNEX at 8-9; NYNEX Reply at 4-5; PacTel at 9-10; PacTel Reply at 6; SBC at 5-6; SBC Reply at 3-4; USTA at 4; U S WEST at 4-5 n.11; U S WEST Reply at 6-7; YPPA at 3; YPPA Reply at 2-3.

[148] Bell Atlantic at 5; BellSouth Reply at 12-13; NYNEX Reply at 4-6; PacTel Reply at 6; U S WEST at 4 n.11 (also contending that it is premature

observe that this position is consistent with the Commission's interpretation of the same language in Computer II and the cellular separation rules, where "operate independently" is not given an independent meaning.[149] Finally, several commenters assert that Congress did not grant the Commission authority to adopt additional regulations in section 274(b).[150]

61. Other commenters contend that the inclusion of the phrase "operated independently," in addition to the requirements in subsection 274(b)(1)-(9), supports the conclusion that we are authorized to and should adopt additional regulations to ensure compliance with section 274(b). They maintain that the "operated independently" language is a separate substantive requirement from those restrictions in subsections 274(b)(1)-(9).[151] These commenters urge us to read the "operated independently" language as authorizing us to adopt additional rules such as those adopted in Computer II. Specifically, they urge us to adopt regulations precluding the separated affiliated or joint venture from: (1) leasing or sharing physical space collocated with regulated transmission facilities used to provide basic service; (2) sharing computer facilities with the local exchange carrier; (3) developing software jointly with the regulated entity; and (4) marketing any other equipment or services to any affiliate.[152] Time Warner further proposes that we adopt regulations precluding the separated affiliate or electronic publishing joint venture from constructing, owning or operating

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for us to exercise any regulatory authority we might have until there is a demonstrated necessity); U S WEST Reply at 6-7; YPPA Reply at 2-3.

[149] Bell Atlantic at 5-6; BellSouth at 13; SBC Reply at 3-4; YPPA at 3-4.

[150] Ameritech Reply at 9; BellSouth at 10; NYNEX at 8; NYNEX Reply at 4; PacTel at 9-10; U S WEST Reply at 6-7; YPPA at 3.

[151] AT&T at 13-14; AT&T Reply at 12-14; MCI Reply at 2-4; Time Warner at 11-13.

[152] AT&T at 14 & n.10; MCI Reply at 5; Time Warner at 12-13.

its own transmission facilities, thereby requiring the separated affiliate or joint venture to purchase its capacity from the regulated carrier under tariff and ensuring "that local exchange monopoly power is not leveraged into the provision of electronic publishing."[153]

[5389] c. Discussion

62. We conclude that the "operated independently" requirement of section 274(b) obligates a separated affiliate to comply with all the requirements of subsections 274(b)(1)-(9). We further conclude that an electronic publishing joint venture, to comply with the "operated independently" requirement of section 274(b), need only satisfy the requirements of subsections 274(b)(1)-(4), (6), and (8)-(9), since subsections 274(b)(5) and 274(b)(7) specifically refer to separated affiliates and not to electronic publishing joint ventures. We discuss more fully below the structural separation requirements of section 274(b), i.e., subsections 274(b)(2), and (5)-(7). As noted above, the transactional requirements of section 274(b), i.e., subsections 274(b)(1), (3), (4), (8), and (9), are discussed in the Accounting Safeguards Order.

63. We reject the arguments made by certain commenters that the phrase "operated independently" is a separate substantive restriction that requires us to apply subsections 274(b)(1)-(9) to both separated affiliates and electronic publishing joint ventures even where the statute refers only to a separated affiliate. We see no reason for Congress to have expressly referred in section 274(b)(5) and section 274(b)(7) to separated affiliates if the restrictions in those subsections were intended to apply to both separated affiliates and electronic publishing joint ventures.

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[153] Time Warner at 13.

64. We also reject the similar argument that the phrase "operated independently" is a separate substantive restriction authorizing us to adopt additional restrictions beyond those in subsections 274(b)(1)-(9). There is no evidence in the statute or its legislative history that Congress intended the restrictions in section 274(b) merely to be a list of minimum requirements that need to be supplemented by additional rules to be imposed on separated affiliates or electronic publishing joint ventures. We find, therefore, that the "operated independently" requirement in section 274(b) is satisfied if a BOC and its separated affiliate or electronic publishing joint venture comply with the applicable restrictions in subsections 274(b)(1)-(9), as noted above.[154] While we decline to adopt additional restrictions beyond those in subsections 274(b)(1)-(9), we reject the argument that Congress did not grant the Commission the authority to do so.[155]

65. This interpretation of the "operated independently" requirement in section 274(b) is not inconsistent with our determination in the Non-Accounting Safeguards Order that the section 272(b)(1) "operate independently" provision imposes requirements beyond those contained in subsections 272(b)(2)-(5).[156] The "operated independently" requirement in section 274(b) is followed by nine substantive restrictions that we read as the criteria to be [5390] satisfied to ensure operational independence between a BOC and its electronic publishing entity created pursuant to section 274(a). In contrast, the "operate independently" provision in section 272 appears in subsection 272(b)(1), which is one of five separate substantive requirements in section 272(b).[157]

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[154] See supra ¶ 62.

[155] See supra ¶¶ 14-20.

[156] Non-Accounting Safeguards Order at ¶¶ 156-70.

[157] Contra AT&T Reply at 12-13.

2. Section 274(b)(2)

a. Background

66. Section 274(b)(2) provides that a separated affiliate or electronic publishing joint venture and the BOC with which it is affiliated shall "not incur debt in a manner that would permit a creditor of the separated affiliate or joint venture upon default to have recourse to the assets of the [BOC]."[158] We sought comment in the Notice on the types of activities a BOC, a separated affiliate, or an electronic publishing joint venture are precluded from engaging in under section 274(b)(2). We tentatively concluded that a BOC may not cosign a contract, or any other instrument, with a separated affiliate or an electronic publishing joint venture by which it would incur debt in violation of section 274(b)(2). We also sought comment on: whether this subsection affects a separated affiliate differently than an electronic publishing joint venture because of their different corporate relationships to the BOC, and whether we should establish specific requirements regarding the types of activities contemplated by section 274(b)(2).[159]

b. Comments

67. A number of commenters generally agree with our tentative conclusion that section 274(b)(2) prohibits a BOC from cosigning with a separated affiliate or an electronic publishing joint venture a contract, or any other instrument, that allows a creditor, upon default, to have recourse to the assets of the BOC.[160] AT&T and MCI maintain that we should also interpret

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[158] 47 U.S.C. § 274(b)(2).

[159] Notice at ¶¶ 37-38.

[160] AT&T at 15-16 (stating, however, that we should clarify that section 274(b)(2) is not limited to such "obvious violations" and that we should retain

section 274(b)(2) to prohibit a BOC's parent holding company from co-signing a debt of a separated affiliate or electronic publishing joint venture.[161] The BOCs, in reply, assert that interpreting section 274(b)(2) to preclude a BOC's parent company from [5391] cosigning a contract or any other instrument with a BOC's separated affiliate or electronic publishing joint venture is neither supported by the statutory language nor public policy. They further state that there is no need for additional regulations to effectuate section 274(b)(2).[162]

c. Discussion

68. As stated in the Notice, we find that the intent of section 274(b)(2) is to protect BOC local exchange and exchange access service subscribers from bearing the cost of default by BOC affiliates.[163] We adopt our tentative conclusion that section 274(b)(2) prohibits a BOC from cosigning with a separated affiliate or an electronic publishing joint venture a contract, or any other instrument, that would incur debt in a manner that grants the creditor recourse, upon default, against the assets of a BOC.[164] Consistent with this conclusion, we further conclude that a BOC's parent is precluded from cosigning a contract or other instrument for a BOC's separated affiliate or electronic

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flexibility to deal with other credit arrangements that may come to our attention); Bell Atlantic Reply at 8-9; MCI at 4; NAA at 4; NYNEX Reply at 6; SBC at 6 (contending that the provision is "self-explanatory" and that "no useful purpose would be served by . . . promulgating a regulation prohibiting a BOC from cosigning a contract or any other instrument . . .").

[161] AT&T at 15-16; MCI at 4.

[162] Bell Atlantic Reply at 8-9; BellSouth Reply at 13; NYNEX Reply at 6; PacTel Reply at 7; SBC Reply at 7; U S WEST Reply at 7-8.

[163] Notice at ¶ 36.

[164] We note that the term "Bell operating company" is defined in section 274(i)(10), which references section 3 of the Act (47 U.S.C. § 153(4)).

publishing joint venture, if the effect is to provide its creditor with recourse, upon default, to a BOC's assets. We reject, however, the arguments urging us to extend the restrictions in section 274(b)(2) to preclude a BOC's section 274 separated affiliate or electronic publishing joint venture from incurring debt in a manner that would permit a creditor, upon default, to have recourse to the assets of a BOC's parent holding company, provided that this recourse does not effectively result in recourse to the assets of the BOC. The text of the statute does not support the proposed restriction. Moreover, it would leave section 274 separated affiliates and electronic publishing joint ventures at a disadvantage as compared with other electronic publishing companies that are permitted to rely upon the credit of their parent corporations.[165]

69. We decline to apply this section differently as to separated affiliates and electronic publishing joint ventures. No arguments were advanced supporting the need for different treatment with respect to these alternate vehicles for providing electronic publishing services, and we see no evidence at this time indicating that this subsection affects these entities differently. In this regard we agree with SBC that "no useful purpose would be served by . . . speculating as to whether the subsection might affect a separated affiliate [5392] differently than a joint venture," and that we should proceed on a case-by-case basis, rather than adopt a "one size fits all" rule.[166]

70. We reject AT&T's proposal that we require contracts or other instruments through which a separated affiliate or electronic publishing joint venture obtains credit to provide expressly that the creditor has no recourse either to the assets of a BOC or to the assets of the parent holding company of a

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[165] Accord Bell Atlantic Reply at 8-9.

[166] SBC at 6 & n.7.

BOC.[167] As stated above, we do not read section 274(b)(2) to preclude a creditor of a separated affiliate or electronic publishing joint venture from having recourse, upon default, to the assets of a BOC parent holding company. Further, given the clarity of section 274(b)(2), we see no need to adopt a rule at this time requiring contracts through which a separated affiliate or electronic publishing joint venture obtains credit to provide expressly that the creditor has no recourse to the assets of a BOC. BOCs, nevertheless, may include such a provision in their contracts, if they so choose.

3. Section 274(b)(5) and Shared Services

a. Background

71. Section 274(b)(5) provides that a separated affiliate and a BOC shall "(A) have no officers, directors, and employees in common after the effective date of this section; and (B) own no property in common."[168] We tentatively concluded in the Notice that, since this subsection does not specifically refer to electronic publishing joint ventures, BOCs are not precluded from sharing officers, directors, and employees with an electronic publishing joint venture.[169] We also tentatively concluded in the Notice that section 274(b)(5) does not preclude a BOC from owning property in common with an electronic publishing joint venture.[170]

72. We also sought comment on the extent of the separation between a BOC and a separated affiliate required by section

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[167] AT&T at 15-16.

[168] 47 U.S.C. § 247(b)(5).

[169] Notice at ¶ 39.

[170] Id.

274(b)(5)(A). We noted, for example, "that section 274(c)(2) permits joint marketing activities between a BOC and either a separated affiliate or electronic publishing joint venture under certain conditions."[171] With respect to a BOC and a separated affiliate, we sought comment on "whether, to the extent that they are engaged in [5393] permissible joint marketing activities, the separated affiliate may share marketing personnel with the BOC."[172] We further sought comment on "how BOCs may engage in joint marketing activities with a separated affiliate pursuant to section 274 274(c)(2)(A) if they cannot share marketing personnel."[173]

73. We invited comment on the types of property encompassed by the phrase "property in common." We tentatively concluded that section 274(b)(5)(B) prohibits a BOC and its separated affiliate from jointly owning goods, facilities, and physical space. We also tentatively concluded that it prohibits the joint ownership of telecommunications transmission and switching facilities, one of the separation requirements we adopted for independent LECs in the Competitive Carrier Fifth Report and Order.[174] Finally, we sought comment on whether the section 274(b)(5) prohibition on joint ownership of property between a BOC and its separated affiliate also precludes a BOC and a separated affiliate from sharing the use of property owned by one entity or the other and from jointly leasing any property.[175]

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[171] Id. at ¶ 40.

[172] Id.

[173] Id.

[174] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket No. 79-252, Fifth Report and Order, 98 FCC 2d 1191, 1198 (1984) (Competitive Carrier Fifth Report and Order) at ¶ 9.

[175] Notice at ¶ 42.

b. Comments

74. Applicability of Section 274(b)(5) to Electronic Publishing Joint Ventures. The BOCs and NAA agree with our tentative conclusion that section 274(b)(5) does not preclude a BOC from having officers, directors, or employees in common with an electronic publishing joint venture. These parties also agree with our tentative conclusion that this section does not bar a BOC from owning property in common with its electronic publishing joint venture.[176] Other commenters disagree with our tentative conclusions. MCI and Time Warner maintain that section 274(b)(5) should apply to both separated affiliates and electronic publishing joint ventures and that interpreting this section to apply only to BOCs and their separated affiliates would undermine what they consider to be the separate substantive "operate independently" requirement of section 274(b).[177] AT&T recognizes that section 274(b)(5), on its face, does not prohibit a BOC from sharing common personnel or owning property in common with an electronic publishing joint venture, but argues that we have authority to proscribe such [5394] sharing arrangements or ownership under section 274(b)(5), if necessary to ensure compliance with the "operated independently" language.[178]

75. Extent of the Separation Required Between a BOC and a Separated Affiliate. Several BOCs state that section 274(b)(5)(A) should not be interpreted to act as a limitation upon the permissible joint marketing activities in section 274(c)(2). They contend that it is not necessary for a BOC and its separated

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[176] Ameritech at 12-13; Ameritech Reply at 10; Bell Atlantic at 5; Bell Atlantic Reply at 4-5; BellSouth at 11-12; NAA at 5; NAA Reply at 3-4; NYNEX at 8-9; PacTel at 10; PacTel Reply at 7-8; SBC at 7.

[177] MCI at 4-5; Time Warner at 14-15; 17-18; Time Warner Reply at 16-17.

[178] AT&T Reply at 16-17.

affiliate to have employees in common to engage in the joint marketing activities permitted by section 274(c)(2). According to these commenters, employees of one entity may perform inbound telemarketing or referral services permitted under section 274(c)(2)(A) and (B) for the other entity.[179]

76. SBC argues that a BOC and a separated affiliate, to the extent they engage in permissible joint marketing activities, should be allowed to employ individuals in common. Specifically, it states that "where there is a conflict between the authority conferred by section 274(c)(2) and the general operational independence requirements of Section 274(b), the former, more specific provisions should control."[180]

77. AT&T states that section 274(b)(5) "prohibit[s] BOC personnel from participating in the operation, planning, marketing or other activities of the separated affiliate, and vice versa ...."[181] MCI states that a BOC should only be allowed to provide telemarketing services pursuant to nondiscriminatory, publicly disclosed contracts.[182]

78. "Property in Common." No commenters oppose and some commenters agree with our tentative conclusion that section 274(b)(5)(B) prohibits a BOC and its separated affiliate from jointly owning goods, facilities, and physical space. They further agree that this section prohibits the joint ownership of telecommunications transmission and switching facilities.[183]

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[179] Bell Atlantic at 10-11; BellSouth at 15; NYNEX Reply at 10-11; PacTel at 10-11; U S WEST at 15-16. See infra ¶ 143.

[180] SBC at 7, 13; SBC Reply at 9.

[181] AT&T at 16.

[182] MCI at 5.

[183] AT&T at 16-17; MCI at 5; NAA at 5; Time Warner at 17 & n.26.

79. Shared Use or Joint Leasing of Property. The BOCs argue that section 274(b)(5)(B) does not prohibit a BOC and its separated affiliate from sharing the use of property owned by one of the entities, or from jointly leasing property. They maintain that [5395] section 274(b)(5)(B) pertains only to ownership of property.[184] Several BOCs note that potential concerns arising from shared use of property are addressed by the requirements of section 274(b)(3).[185] AT&T and Time Warner, on the other hand, urge us to interpret section 274(b)(5)(B) to prohibit a BOC and its separated affiliate both from sharing property owned by one of the entities and from jointly leasing property.[186] MCI does not address whether this section permits joint leasing of property. It states, however, that joint use of property would invite the improper allocation of costs against which the separated affiliate requirement is intended to protect.[187] MCI and Time Warner specifically contend that a separated affiliate should not be

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[184] Ameritech at 13; Ameritech Reply at 11; BellSouth at 15; NAA at 5; NYNEX at 9-10; NYNEX Reply at 7; PacTel at 11; SBC at 8; SBC Reply at 7-8; USTA at 4 (noting that we must continue to recognize the economies of integration derived from sharing that we have allowed under our Computer II structural separation requirements); U S WEST at 18-19; YPPA at 4-5.

[185] NAA at 5; NYNEX Reply at 7; PacTel at 11; SBC Reply at 7-8; USTA at 4; U S WEST at 18-19; YPPA at 4-5. Section 274(b)(3) provides that a separated affiliate or electronic publishing joint venture and the BOC with which it is affiliated "shall carry out transactions (A) in a manner consistent with such [operational] independence, (B) pursuant to written contracts or tariffs that are filed with the Commission and made publicly available, and (C) in a manner that is auditable in accordance with generally accepted auditing standards."

[186] AT&T at 16-17 (contending that we should clarify that this section precludes a BOC from establishing a second affiliate to perform services or own property for both a BOC and its separated affiliate and from using any compensation system that bases the compensation of BOC personnel on the performance of the affiliate, or vice versa, discussed infra at ¶¶ 81, 87); AT&T Reply at 15; Time Warner at 13; Time Warner Reply at 12.

[187] MCI at 5; MCI Reply at 5-6.

permitted to collocate its equipment with BOC local exchange and exchange access equipment or to share computer facilities.[188]

80. Sharing of Services. NYNEX and Ameritech argue that neither the Act nor its legislative history can be read to prohibit a BOC and its separated affiliate from utilizing the administrative and corporate governance functions provided by their parent holding company.[189] AT&T argues that we should prohibit, pursuant to section 274(b)(5), a BOC from establishing a second affiliate to perform services or own property for both the BOC and its separated affiliate.[190] MCI, in reply to the BOCs' comments, states that we should preclude the sharing of in-house functions, either by having one entity perform such functions [5396] for the other or by having another affiliate, or the parent, perform them for both a BOC and its separated affiliate.[191]

81. Other Activities. AT&T argues that we "should prohibit the BOCs from using any compensation system that directly or indirectly bases the compensation of BOC officers, directors, or other employees on the performance of the affiliate, or vice versa."[192] The BOCs generally reply that there is no statutory basis for such a requirement, which would effectively preclude BOCs from offering stock options, other forms of deferred compensation, and bonuses which are commonly used in industry and frequently are based, in part, upon the performance

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[188] MCI Reply at 5; Time Warner at 13.

[189] Ameritech Reply at 12; NYNEX at 10-18; NYNEX Reply at 7-8; see also PacTel Reply at 8 (stating that nothing in section 274(b)(5)(A) prevents an affiliate of both a BOC and a separated affiliate from providing services to both of them).

[190] AT&T at 17.

[191] MCI Reply at 6.

[192] AT&T at 17.

of entities within a corporate family.[193]

c. Discussion

82. Applicability of Section 274(b)(5) to Electronic Publishing Joint Ventures. We adopt our tentative conclusion that section 274(b)(5)(A) does not preclude a BOC from having officers, directors, and employees in common with an electronic publishing joint venture. We also adopt our tentative conclusion that section 274(b)(5)(B) does not preclude a BOC from owning property in common with an electronic publishing joint venture. Congress expressly limited the scope of these restrictions to a BOC's separated affiliate. Moreover, we find no basis in this record for extending these restrictions to a BOC's electronic publishing joint venture. This determination is consistent with our finding above that the phrase "operated independently" in section 274(b) is not a separate substantive restriction and, therefore, does not provide a basis for making section 274(b)(5) applicable to electronic publishing joint ventures.[194]

83. Extent of the Separation Required Between a BOC and a Separated Affiliate. We find that section 274(b)(5)'s provision barring a BOC and its separated affiliate from having "officers, directors, and employees in common" does not limit the permissible joint activities set forth in section 274(c)(2).[195] As certain commenters note, it is not necessary for a BOC and its separated affiliate to have employees in common to engage in the joint activities permitted under section 274(c)(2). For this reason, we reject those comments urging us to read section 274(c)(2) as allowing a BOC and its separated affiliate to have personnel in

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[193] BellSouth Reply at 13-14; PacTel Reply at 8; U S WEST Reply at 8-9.

[194] See supra ¶ 63.

[195] See generally part III.C.2. infra, discussing "permissible joint activities" pursuant to section 274(c)(2).

common for the purpose of engaging in permissible joint activities. Such an exception to the prohibition in section 274(b)(5) is not necessary to give effect to sections 274(b)(5) and [5397] 274(c)(2) and is not supported by the statutory language. While our interpretation of the interplay between section 274(b)(5) and section 274(c)(2) may result in some reduced efficiency in engaging in the joint activities permitted under section 274(c)(2),[196] we are not convinced that it will be substantial enough to warrant our reading into section 274(b)(5) an exception where none exists in the statutory language.[197]

84. "Property in Common." We adopt our tentative conclusion that section 274(b)(5) prohibits a BOC and its separated affiliate from jointly owning goods, facilities, and physical space, including telecommunications transmission and switching facilities. The prohibition against joint ownership of goods, facilities and physical space is clear on the face of the statute. Moreover, none of the commenters disagree with this tentative conclusion.

85. Shared Use or Joint Leasing of Property. We agree with the BOCs that the statutory prohibition in section 274(b)(5) does not preclude a BOC and its separated affiliate from either sharing the use of property owned by either a BOC or its separated affiliate or jointly leasing property. For example, we find that section 274(b)(5) permits a separated affiliate to collocate its equipment in end offices or on other property owned or controlled by the BOC, as long as such collocation agreements satisfy section 274(b)(3).[198] We also find that this section permits

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[196] See Notice at ¶ 40.

[197] Only SBC argues that requiring a BOC and its separated affiliate to employ separate marketing personnel "would reduce the efficiencies generally associated with joint marketing ventures." SBC at 7.

[198] See supra note 185, see also Non-Accounting Safeguards Order at ¶ 161.

a BOC and its separated affiliate to contract with each other for the use of joint transmission and switching equipment, again subject to the requirements of section 274(b)(3). Those commenters arguing for an expanded interpretation of "own" to include a prohibition against shared use of property and joint leasing of property offer no statutory support for their position. We are unwilling to assume that Congress intended the prohibition against ownership of property in section 274(b)(5) to include leaseholds and the shared use of property owned by either a BOC or its separated affiliate. Further, we find that allowing shared use of property and joint leases between a BOC and its separated affiliate enables the BOC to take advantage of economies of scale and scope. Concerns about anticompetitive behavior can be addressed through the transactional requirements of section 274(b)(3), the nondiscrimination requirements of section 274(d), and the Commission's affiliate transaction rules.[199]

86. Sharing of Services. The prohibition in section 274(b)(5)(A) against a BOC and its separated affiliate having "officers, directors, and employees in common" is worded slightly differently from the requirement in section 272(b)(3) that a BOC and its separate affiliate have "separate officers, directors, and employees." We interpret, however, these two [5398] provisions to have the same substantive meaning.[200] Both sections 272 and 274 preclude the same person from serving simultaneously as an officer, director, or employee of both a BOC and its section 272 or 274 affiliate, respectively. Thus, an individual may not be on the payroll of both entities. Based on the record before us, we decline to read section 274(b)(5)(A) to prohibit a BOC and its separated affiliate from utilizing the administrative and corporate governance functions provided by

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[199] See 47 C.F.R. §§ 64.901-64.904.

[200] See Non-Accounting Safeguards Order at ¶ 178.

their parent holding company or another BOC affiliate. Section 274 does not address whether the parent company of a BOC and its separated affiliate or another BOC affiliate is permitted to perform functions for both a BOC and its separated affiliate. There is no basis in the record for concluding that administrative and corporate governance functions provided to a BOC and its separated affiliate by a parent company or another BOC affiliate would result in the BOC and its separated affiliate violating section 274(b)(5)(A)'s prohibition on having "officers, directors, and employees in common." Further, a parent company that performs services for both a BOC and its section 274 separated affiliate must fully document and properly apportion the costs incurred in furnishing such services.[201]

87. Other Activities. We reject AT&T's request that we interpret section 274(b)(5)(A) to prohibit compensation schemes that base the level of remuneration of BOC officers, directors, and employees on the performance of the section 274 separated affiliate, or vice versa. We find that tying the compensation of an employee of a section 274 separated affiliate to the performance, for example, of the BOC's parent holding company and all of its enterprises as a whole, including the performance of the BOC, does not make that individual an employee of the BOC for purposes of section 274(b)(5)(A). Nor does such a compensation arrangement for a BOC employee make that individual an employee of the section 274 separated affiliate.[202] Further, we agree with those commenters stating that such a scheme would effectively preclude BOCs from offering stock options, other forms of deferred compensation, and bonuses, which are commonly used in industry and frequently are based, in part, upon the performance of entities within a corporate family.[203]

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[201] See 47 C.F.R. §§ 64.901-64-904.

[202] See also Non-Accounting Safeguards Order at ¶ 186.

[203] See supra ¶ 81.

Indeed, as PacTel notes, "it is common for corporations to have compensation systems that base a portion of compensation, especially for officers and directors, on the performance of the corporation as a whole. This is consistent with the fiduciary duty of corporate officers and directors ...."[204]

[5399] 4. Section 274(b)(6)

a. Background

88. Section 274(b)(6) states that a separated affiliate or electronic publishing joint venture and the BOC with which it is affiliated shall "not use for the marketing of any product or service of the separated affiliate or joint venture, the name, trademarks, or service marks of an existing [BOC] except for names, trademarks, or service marks that are owned by the entity that owns or controls the [BOC]."[205] We tentatively concluded that this provision is sufficiently precise as to make unnecessary the adoption of implementing regulations.[206]

b. Comments

89. Time Warner asks us to clarify that the prohibition in section 274(b)(6) prevents a BOC from sharing a name, trademark, or service mark with the Regional Bell Holding Company ("RBOC"). It argues that the exception in section 274(b)(6) permitting the separated affiliate or electronic publishing joint venture to use the name, trademark, or service mark of the RBOC would "vitiate the general prohibition against cross-labeling if the BOC affiliates or joint ventures were permitted to use names, trademarks, or service marks that are

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[204] PacTel Reply at 8.

[205] 47 U.S.C. § 274(b)(6).

[206] Notice at ¶ 43.

shared by an operating company and the [RBOC]."[207]

90. The BOCs and YPPA, in reply, state that Time Warner's suggestion is unsupported by the statutory language and would eliminate the express statutory exception Congress created in section 274(b)(6).[208]

c. Discussion

91. We adopt our tentative conclusion that section 274(b)(6) does not require the adoption of implementing regulations. We find that Time Warner's suggestion is contradicted by the statutory language and legislative history that expressly allow a separated affiliate or electronic publishing joint venture to use "the names, trademarks, or service marks that are owned by the entity that owns or controls the [BOC]."[209] We agree with BellSouth that the adoption of Time Warner's suggestion "would require the Commission to assume that [5400] Congress was unaware that four of the seven [RBOCs] share their names with their BOC subsidiaries."[210] We decline to make this assumption.

5. Section 274(b)(7)

a. Background

92. Section 274(b)(7) states that a BOC is not permitted "(A) to perform hiring or training of personnel on behalf of a separated affiliate; (B) to perform the purchasing, installation, or

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[207] Time Warner at 16-17.

[208] Ameritech Reply at 14-15; Bell Atlantic Reply at 7; BellSouth Reply at 14-15; NYNEX Reply at 8; PacTel Reply at 9; SBC Reply at 10-11; YPPA Reply at 7-8.

[209] 47 U.S.C. § 274(b)(6); see Joint Explanatory Statement at 155.

[210] BellSouth Reply at 14.

maintenance of equipment on behalf of a separated affiliate, except for telephone service that it provides under tariff or contract subject to the provisions of this section; or (C) to perform research and development on behalf of a separated affiliate."[211] Since this subsection does not specifically refer to electronic publishing joint ventures, we tentatively concluded that BOCs are permitted to perform these functions on behalf of an electronic publishing joint venture.[212] In addition, we sought comment on whether, "to the extent that a BOC and a separated affiliate are engaged in permissible joint marketing activities," a BOC may perform the hiring or training of marketing personnel on behalf of its separated affiliate under section 274(b)(7)(A).[213] We also sought comment on the type of "equipment" encompassed by section 274(b)(7)(B). We asked, for example, whether a BOC providing telephone service to a separated affiliate under tariff or contract subject to the requirements of section 274 is permitted under section 274(b)(7)(B) to purchase, install, and maintain transmission equipment for the separated affiliate.[214]

93. With respect to section 274(b)(7)(C), we asked whether there are any circumstances under which a BOC may share its research and development with its separated affiliate. Specifically, we sought comment on whether this provision simply limits a BOC's ability to perform research and development for the sole and exclusive use of a separated affiliate, or whether it requires a BOC to refrain from performing any research and development that may be potentially useful to a separated affiliate. We also asked about other ways in which

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[211] 47 U.S.C. § 274(b)(7).

[212] Notice at ¶ 44.

[213] Id. at ¶ 45.

[214] Id.

this provision may limit a BOC's ability to perform research and development for the separated affiliate.[215]

[5401] b. Comments

94. Applicability of Section 274(b)(7) to Electronic Publishing Joint Ventures. The BOCs and NAA agree with our tentative conclusion that BOCs are permitted to perform the functions in section 274(b)(7) on behalf of an electronic publishing joint venture.[216] Time Warner and AT&T disagree with our tentative conclusion. They maintain, consistent with their argument respecting section 274(b)(5), that section 274(b)(7) should apply to both a separated affiliate and an electronic publishing joint venture. They state that this interpretation is necessary to give effect to what they consider a separate substantive requirement that a BOC be "operated independently" from its electronic publishing joint venture.[217]

95. Relationship Between Section 274(b)(7)(A) and Section 274(c)(2). Several commenters argue that there is no exception in section 274(b)(7) for permissible joint marketing activities in section 274(c)(2) and, therefore, we should not permit a BOC, when engaged in permissible joint marketing with its separated affiliate, to perform the hiring or training of marketing personnel

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[215] Id. at ¶ 46.

[216] Ameritech at 14; Ameritech Reply at 10; Bell Atlantic at 5; Bell Atlantic Reply at 4 & n.10; BellSouth at 12; BellSouth Reply at 11-12; NAA at 5; NAA Reply at 3; PacTel at 12; PacTel Reply at 9-10; SBC at 8-9.

[217] Time Warner at 14-15; 20; Time Warner Reply at 16-17; AT&T Reply at 16-17; (acknowledging that section 274(b)(7) does not expressly bar a BOC from performing the functions in that section on behalf of an electronic publishing joint venture, but asserting that the "operated independently" language gives the Commission the authority to preclude such activities between a BOC and an electronic publishing joint venture). MCI made the same argument only with respect to section 274(b)(5).

on behalf of the separated affiliate.[218] SBC, however, argues that we should allow a BOC to hire and train marketing personnel to carry out the permissible joint marketing activities in section 274(c)(2). It states that this approach is not anticompetitive because teaming or other business arrangements entered into by a BOC pursuant to section 274(c)(2)(B) must be conducted on a nondiscriminatory basis.[219]

96. The Type of "Equipment" Encompassed by Section 274(b)(7)(B). The majority of commenters agree that section 274(b)(7)(B) permits a BOC to purchase, install, and maintain transmission equipment for its separated affiliate if the BOC is providing telephone service to the separated affiliate under tariff or contract.[220] Bell Atlantic urges us to differentiate between "provision of a service that uses equipment owned by the BOC, an arrangement specifically permitted under this subsection, from the purchasing, installation, [5402] and maintenance of equipment 'on behalf of' the affiliate, which is barred."[221] The distinction, according to Bell Atlantic, is that in the latter situation, the equipment would be owned by the separated affiliate. U S WEST similarly states that this section prohibits a BOC from providing any depreciable equipment to be used by its separated affiliate in conducting the affiliate's business, but that it does not prohibit a BOC from providing services to its section 274 affiliate operation.[222] Several other BOCs argue that the provision of telephone services includes purchasing, installation,

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[218] AT&T at 18; NAA at 5; Time Warner at 19; Time Warner Reply at 10-11.

[219] SBC at 9.

[220] Ameritech at 15 (as long as transmission equipment is an integral part of a BOC provision of telephone service); Bell Atlantic at 6; NAA at 5-6; PacTel at 12; SBC at 10; USTA at 4.

[221] Bell Atlantic at 6 (emphasis in original).

[222] U S WEST at 19-20.

or maintenance of transmission equipment, and any other equipment necessary or incidental to providing such service. They note that section 274(b)(3) ensures that there are ample safeguards that such transactions are conducted at arm's length.[223] Other commenters state only that section 274(b)(7)(B) requires BOCs to provide telephone service pursuant to section 274(d).[224] Time Warner specifically urges us to require BOCs to provide unaffiliated electronic publishers with the same access to wireline telephone exchange services that they provide to their in-region separated affiliate or electronic publishing joint venture.[225]

97. Limitations on Research and Development. The BOCs, NAA, and USTA generally argue that section 274(b)(7)(C) only limits their ability to perform research and development for the sole and exclusive use of the separated affiliate. They contend that it would be against public policy to restrict BOCs from performing research and development simply because the results might, at some later date, be applied to electronic publishing.[226] Time Warner argues that the statutory language of section 274(b)(7)(C) should lead us to prohibit BOCs, under any circumstances, from sharing any research and development work

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[223] PacTel at 12; SBC at 10; SBC Reply at 12; USTA at 4.

[224] AT&T at 18; Time Warner at 19.

[225] Time Warner at 19.

[226] Ameritech at 15 (contending that section 274(b)(7)(C) only prohibits BOC research and development activity for the sole or "primary" use of a separated affiliate); Ameritech Reply at 11; Bell Atlantic at 6-7; BellSouth at 13-14 & n.33; NAA at 6; NYNEX Reply at 8-9; PacTel at 12-13; PacTel Reply at 10; SBC at 10-11; SBC Reply at 12-13; USTA at 5; U S WEST at 20; U S WEST Reply at 9 (contending that a BOC is permitted to engage in R&D and to share it with all entities within the corporate family as long as it is not performed "solely, exclusively, or primarily for the electronic publishing affiliate").

or results with their in-region electronic publishing affiliates. It further states that we should adopt the Computer II rules that preclude specific research and development by the regulated entity on behalf of the competitive affiliate.[227] AT&T, in reply to the BOCs' comments, states only that we "should reject the BOCs' attempts to circumvent the prohibition in [5403] section 274(b)(7)(C) against BOC research and development on behalf of a separated affiliate through hypertechnical constructions."[228]

c. Discussion

98. Applicability of Section 274(b)(7) to Electronic Publishing Joint Ventures. We adopt our tentative conclusion that section 274(b)(7) does not preclude a BOC from performing the activities in section 274(b)(7) on behalf of an electronic publishing joint venture. The reasons supporting this determination are the same as those supporting our determination that section 274(b)(5) is inapplicable to electronic publishing joint ventures.[229]

99. Relationship Between Section 274(b)(7)(A) and Section 274(c)(2). We agree with those commenters asserting that the restrictions in section 274(b)(7)(A) on a BOC performing the hiring or training of personnel on behalf of a separated affiliate apply even when the BOC is engaged in permissible joint activities pursuant to section 274(c)(2).[230] Reading an exception into section 274(b)(7)(A) for the joint activities permitted under section 274(c)(2) is neither supported by the statutory language,

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[227] Time Warner at 19-20 & n.20; Time Warner Reply at 12.

[228] AT&T Reply at 16.

[229] See supra ¶¶ 62-63, 82.

[230] See generally discussion of "permssible joint activities," infra part III.C.2.

nor necessary to give effect to that section and section 274(c)(2). Thus, a BOC may not perform the hiring or training of personnel on behalf of its separated affiliate, even though it may be engaged in permissible joint activities under section 274(c)(2), such as providing inbound telemarketing services or engaging in nondiscriminatory teaming or business arrangements, as discussed below.[231]

100. The Type of "Equipment" Encompassed by Section 274(b)(7)(B). We find that section 274(b)(7)(B) prohibits a BOC from purchasing, installing, or maintaining equipment on behalf of its separated affiliate, except for the telephone service that it provides under tariff or contract. We agree with the position of several commenters that the provision of telephone service includes purchasing, installing, and maintaining equipment necessary or incidental to providing such service.[232] As long as the equipment providing the telephone service is owned by a BOC, and not its separated affiliate, such activities are permissible under this section. We note, as some commenters suggest, that, even when engaging in permissible activities under section 274(b)(7), BOCs remain subject to the nondiscrimination requirements in section 274(d).[233]

[5404] 101. Limitations on Research and Development. We conclude that the prohibition in section 274(b)(7)(C) on a BOC performing research and development "on behalf of" its separated affiliate precludes a BOC, at a minimum, from performing research and development for the sole and exclusive use of the separated affiliate. We also find that it precludes a BOC from performing research and development for the use or benefit of its section 274 separated affiliate together with other

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[231] Id.

[232] See supra ¶ 96.

[233] See id.

affiliates. We further conclude, however, that the prohibition in section 274(b)(7)(C) on a BOC performing research and development "on behalf of" its separated affiliate, as interpreted herein, does not limit a BOC's ability to perform research and development simply because the results might, at a future date, be applied to electronic publishing. We agree with those commenters arguing that such an interpretation "would not serve the public's continued desire for new and different communications solutions"[234] and would be "antithetical to the public interest and national policy under Section 7 of the Communications Act."[235] We also find that it would be impractical for a BOC to anticipate all potential uses of research and development activities it might undertake.[236] We recognize that these principles may not address all of the possible scenarios that may arise. Such determinations are fact specific and will need to be made on a case-by-case basis.

102. Further, we disagree with Time Warner that prohibiting a BOC from sharing any research and development work or results with its separated affiliate is supported by the statutory language. Time Warner and AT&T fail to offer any persuasive statutory or policy arguments in support of their position.

6. Comparison with "Separate Affiliate" Requirement of Section 272

a. Background

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[234] SBC at 11.

[235] BellSouth at 13-14, citing 47 U.S.C. § 157(a). This section provides that "it shall be the policy of the United States to encourage the provision of new technologies and services to the public. Any person or party (other than the Commission) who opposes a new technology or service proposed to be permitted under this Act shall have the burden to demonstrate that such proposal is inconsistent with the public interest."

[236] BellSouth at 13-14.

103. We sought comment in the Notice on the interrelationship between the requirements for a "separate affiliate" in section 272(b) and the requirements for a "separated affiliate" and "electronic publishing joint venture" in section 274(b).[237] To the extent that certain BOCs currently are providing all of their information services on an integrated basis, we sought comment on what modifications these BOCs would have to make to their current [5405] provision of service in order to provide electronic publishing services in compliance with the separated affiliate or electronic publishing joint venture requirements of section 274.[238]

104. We also sought comment on whether a BOC may provide electronic publishing services through the same entity or affiliate through which it provides in-region interLATA telecommunications services, manufacturing activities, and interLATA information services.[239] In addition, we sought comment on whether a BOC providing any or all of its section 272 services and its section 274 electronic publishing services through the same entity would have to comply with the requirements of section 272, section 274, or both.[240]

b. Comments

105. There were few comments on the interrelationship between the requirements in sections 272(b) and 274(b). Ameritech states that the requirements of section 272(b) are a subset of those found in section 274(b), but that section 274(b)

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[237] Notice at ¶ 47. We note that the structural and transactional requirements in section 272 for a "separate affiliate" are different than those in section 274 for a "separated affiliate."

[238] Id.

[239] Id. at ¶ 48.

[240] Id.

imposes additional requirements beyond those in section 272(b). It notes that another principal difference between the separation requirements of the two sections is that a section 272 separate affiliate may own or be owned by a BOC as long as the separation requirements of that section are satisfied; however, a section 274 separated affiliate may not own or be owned by the BOC entity.[241] NYNEX states that sections 272 and 274 deal with considerably different affiliate activities and should be construed to be independent of each other.[242] PacTel states that, to the extent there are similarities in the requirements specified in sections 272(b) and 274(b), those requirements should be interpreted consistently.[243]

106. AT&T also notes that several of the requirements in the two sections overlap, but, like Ameritech states, that section 274(b) imposes additional requirements having no counterpart in section 272(b).[244] AT&T further asserts that all interLATA electronic publishing services should be subject to the requirements of section 272, and that section 274 [5406] merely supplements the requirements of section 272.[245] In reply, Bell Atlantic and YPPA state that a section 274 separated affiliate need not also comply with section 272, even if the electronic publishing services are interLATA. They maintain that Congress, in enacting section 272(a)(2)(C), expressly exempted interLATA electronic publishing services from the requirements of section 272.[246]

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[241] Ameritech at 10-11.

[242] NYNEX at 10.

[243] PacTel at 13.

[244] AT&T at 18-19 & n.12 (noting that sections 274 (b)(4),(b)(5)(B), (b)(6), (b)(7) and (b)(8) have no counterpart in section 272(b)).

[245] AT&T at 2-4.

[246] Bell Atlantic Reply at 2-4; YPPA Reply at 5-6.

107. All of the commenters agree that a BOC may provide electronic publishing services through the same entity or affiliate through which it provides section 272 services.[247] They disagree, however, on whether an affiliate providing both section 272 and section 274 services must comply with all of the requirements of both sections. AT&T, MCI and Time Warner state that a BOC offering electronic publishing services and section 272 services through the same affiliate must comply with all of the requirements of sections 272 and 274, i.e., the structural separation and transactional requirements, as well as the joint marketing and nondiscrimination provisions of both sections.[248]

108. The BOCs and YPPA disagree with the other commenters. They argue that a BOC providing electronic publishing services through the same entity or affiliate through which it provides section 272 services must comply with the separation requirements in both sections 272(b) and 274(b) on a service-by-service basis. Specifically, they maintain that the entity providing both section 272 services and electronic publishing services must comply only with the requirements of each section relevant to the particular service (i.e., a section 272 service or electronic publishing services) being provided. They further argue that a BOC need only comply with the joint marketing and nondiscrimination restrictions of sections 272 and 274 on a service-by-service basis.[249]

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[247] Ameritech at 12; Ameritech Reply at 11; AT&T at 19; Bell Atlantic at 7; BellSouth at 15-16; MCI at 6; NYNEX at 5; NYNEX Reply at 13; PacTel at 13-14; Time Warner at 31; Time Warner Reply at 12; U S WEST at 3-4; U S WEST Reply at 4; YPPA at 5.

[248] AT&T at 19; MCI at 6; Time Warner at 31-32; Time Warner Reply at 12-13.

[249] Ameritech at 12 & n.34; Ameritech Reply at 11-12 & n.36; Bell Atlantic at 7; BellSouth at 16 n.37; NYNEX at 5; NYNEX Reply at 13; PacTel at 13-14; PacTel Reply at 11; U S WEST at 3-4; U S WEST Reply at 4-6; YPPA at 5-6; YPPA Reply at 4-6.

109. There is some disagreement among the BOCs as to those requirements in section 274(b) that they deem applicable when providing section 272 and section 274 services through the same entity. Several BOCs assert that the separation requirements unique to either section 272 or section 274 would apply only to those services specified in their respective sections, e.g., because section 272 does not prohibit the hiring and training of personnel, section 274(b)(7)(A) would only apply with respect to the entity's electronic [5407] publishing activities.[250] U S WEST categorizes those requirements that the entity must comply with in sections 272(b) and 274(b) as structural separation requirements, arguing that compliance with the "transactional" requirements of either section is necessitated on a service-by-service basis.[251] It categorizes section 274(b)(7)(A) as an example of a transactional requirement. YPPA, too, distinguishes between the structural separation requirements and the affiliate transaction requirements of sections 272(b) and 274(b), arguing that the latter need only be complied with on a service-by-service basis. It cites sections 272(b)(5) and 274(b)(3) as examples of affiliate transaction requirements that need only be complied with on a service-by-service basis.[252]

c. Discussion

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[250] Ameritech Reply at 12 & n.36; Bell Atlantic at 7 (stating that any combined activities would be subject to the restrictions contained in both sections," to the extent those restrictions differ," but that separable activities within the same affiliate would, where feasible, be subject only to the section of the statute addressing each activity); NYNEX at 5; NYNEX Reply at 13-14; PacTel at 13-14; U S WEST at 3-4; U S WEST Reply at 4-6. We note that Ameritech, in its initial comments, asserted that "the affiliate chosen to house both Section 272 and Section 274 services must comply with the separations [sic] requirements of both Sections." Ameritech at 12 n.34.

[251] U S WEST at 4-5;U S WEST Reply at 4-6.

[252] YPPA at 5-6; YPPA Reply at 4-6.

110. We conclude that a BOC may provide electronic publishing services and section 272 services through the same entity or affiliate. Nothing in the Act or its legislative history suggests otherwise. We further conclude that the BOC or the entity providing both section 272 and section 274 services, as applicable, must comply with the requirements of both these sections, including: (1) all of the requirements of section 272(b) and section 274(b); (2) all applicable requirements of section 272(g) and section 274(c); and (3) all applicable requirements of section 272(c) and section 274(d). To the extent there is a conflict between the provisions of sections 272 and 274, the BOC or the entity providing both section 272 and 274 services, as applicable, must comply with the more stringent requirement of either section. These conclusions are discussed more fully below. We specifically reject AT&T's contention that electronic publishing services are subject to the section 272 separate affiliate requirements, pursuant to section 272(a)(2)(B), which imposes a separate affiliate requirement on interLATA telecommunications services.[253] Electronic publishing services are included within the statutory definition of information services in section 153(20).[254] They [5408] are specifically excluded, however, from the section 272 separate affiliate requirement pursuant to section 272(a)(2)(C).[255]

111. Section 272(b) and Section 274(b) Requirements. We agree with those commenters asserting that a BOC providing electronic publishing services through the same entity or affiliate through which it provides section 272 services must comply with all of the requirements of both section 272(b) and 274(b). Allowing the BOCs to comply with the requirements of sections 272(b) and 274(b) on a service-by-service basis is likely to lead

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[253] AT&T at 2-4.

[254] 47 U.S.C. § 153(20).

[255] See Non-Accounting Safeguards Order at ¶ 142.

to ad hoc determinations as to those requirements in both sections 272(b) and 274(b) with which the entity must comply.[256]

112. We find that allowing the entity performing section 272 and section 274 services to determine how to comply with the section 272(b) and section 274(b) requirements creates the potential for administrative and enforcement problems. As a practical matter, however, requiring the entity providing both section 272 and section 274 services to comply with all the requirements of sections 272(b) and 274(b) will not be substantially more onerous than requiring the entity to comply with only those provisions of one section or the other. We determined in the Non-Accounting Safeguards Order that the "operate independently" requirement of section 272(b)(1) imposes requirements beyond those listed in subsections 272(b)(2)-(5). We therefore adopted additional requirements in our rules to implement section 272(b) to ensure operational independence between a BOC and its section 272 affiliate; several of these are parallel to provisions in section 274(b).[257] Thus, BOCs providing section 272 and section 274 services are already required to comply with many of the same requirements; and to the extent these services are combined the complications of complying with both sections 272(b) and 274(b) will be few.

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[256] For example, the commenters suggest some confusion as to those requirements in section 274(b) we should deem inapplicable when the entity is providing only section 272 services. Ameritech and PacTel state that the entity providing both section 272 and section 274 services must satisfy only the separation requirements common to both sections. See Ameritech Reply at 11-12 & n.36; PacTel at 13-14. U S WEST agrees with Ameritech and Pactel. It, however, refers to sections 274(b)(5) and 274(b)(7), which have no counterpart in section 272(b) as "transactional," even though they are addressed in the Notice as structural separation requirements of section 274(b). YPPA, on the other hand, refers to section 274(b)(3) as an affiliate transaction requirement, consistent with our treatment of that subsection in the Accounting Safeguards Order.

[257] See Non-Accounting Safeguards Order at ¶¶ 156-70.

113. Joint Marketing and Nondiscrimination Provisions in Sections 272 and 274. As noted above, while a BOC may provide both section 272 services and electronic publishing services through the same entity, it must comply with the applicable joint marketing and nondiscrimination provisions in both sections 272 and 274. With respect to the joint marketing provisions, if a BOC chooses to provide section 272 services together with its electronic publishing services, it must comply with the joint marketing restrictions of section [5409] 274(c)(1)(A) and section 272(g). Section 274(c)(1)(A) precludes the BOC from carrying out any "promotion, marketing, sales, or advertising for or in conjunction with a separated affiliate."[258] An entity established by a BOC to provide section 272 services and electronic publishing services is a section 274 "separated affiliate" for purposes of section 274(c)(1)(A), as it will be a "corporation . . . that engages in the provision of electronic publishing services."[259] The BOC, therefore, must comply with all the section 274 joint marketing provisions pertaining to its "separated affiliate." In addition, since the entity is also providing section 272 services, the joint marketing provisions in section 272(g) would apply as well.

114. The statutory language in sections 272(c) and 274(d) also requires that a BOC providing both section 272 services and electronic publishing services together in one entity comply with the nondiscrimination provisions in both sections 272 and 274. To the extent that a BOC under "common ownership or control with a separated affiliate or electronic publishing joint venture"

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[258] 47 U.S.C. § 274(c)(1)(A). See discussion infra part III.C.1.

[259] Section 274(i)(9) defines "separated affiliate" as a "corporation under common ownership or control with a [BOC] that does not own or control a [BOC] and is not owned or controlled by a [BOC] and that engages in the provision of electronic publishing which is disseminated by means of such [BOC's] or any of its affiliates' basic telephone service." 47 U.S.C. § 274(i)(9).

provides "network access and interconnections for basic telephone service to electronic publishers,"[260] it must do so subject to the nondiscrimination requirements in section 274(d).[261] In addition, section 272(c) imposes certain nondiscrimination safeguards on a BOC's dealings with an affiliate providing section 272 services.[262] The nondiscrimination safeguards of section 272(c) thus pertain to the BOC's dealings with an entity or affiliate providing both section 272 services and electronic publishing services.

115. In sum, we find that a BOC may provide both section 272 and section 274 services through the same entity, but in doing so, must comply with the applicable joint marketing and nondiscrimination requirements in each of those sections. We find that the express statutory language in each of those sections compels this result. As noted above, to the extent there is a conflict between the provisions of sections 272 and 274, the BOC or the entity providing both section 272 and 274 services, as applicable, must comply with the more stringent requirement of either section. For example, if a BOC is permitted to engage in a joint marketing activity under section 272(g), but that activity is barred under section 274(c)(1)(A), the latter provision would preclude the BOC from engaging in that activity.

[5410] C. Joint Marketing

1. Restrictions on Joint Marketing Activities -- Section 274(c)(1)

a. Scope of Section 274(c)(1)(B)

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[260] 47 U.S.C. § 274(d).

[261] See discussion of section 274(d) infra part III.D.

[262] See 47 U.S.C. § 272(c).

1) Background

116. Section 274(c)(1) of the Act establishes several restrictions on joint marketing activities in which a BOC may engage with either a "separated affiliate" or an "affiliate." In particular, section 274(c)(1)(A) provides that "a [BOC] shall not carry out any promotion, marketing, sales, or advertising for or in conjunction with a separated affiliate."[263] Section 274(c)(1)(B) states that "a [BOC] shall not carry out any promotion, marketing, sales, or advertising for or in conjunction with an affiliate that is related to the provision of electronic publishing."[264]

117. In the Notice, we observed that the clause "that is related to the provision of electronic publishing" in section 274(c)(1)(B) may be interpreted to modify either the "promotion, marketing, sales, or advertising" activities that are circumscribed by that section, or the word "affiliate."[265] We also noted that the definition of "affiliate" in section 274 expressly excludes a "separated affiliate."[266] We therefore sought comment on the proper interpretation of section 274(c)(1)(B).[267]

2) Comments

118. Several commenters argue that section 274(c)(1)(B) of the Act should be interpreted to prohibit a BOC from carrying out joint marketing activities for or in conjunction with an affiliate if the activities of the BOC relate to the provision of

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[263] 47 U.S.C. § 274(c)(1)(A).

[264] Id. § 274(c)(1)(B).

[265] Notice at ¶ 50.

[266] Id. at ¶ 49.

[267] Id. at ¶ 50.

electronic publishing.[268] In particular, BellSouth argues that section 274(c)(1)(B) is intended to address situations in which a BOC affiliate offers electronic publishing services or services related to electronic publishing, and non-electronic publishing services, i.e., an affiliate that provides [5411] print directory services as well as electronic publishing services.[269] BellSouth contends that, by omitting the word "separated" in subsection (c)(1)(B), Congress clarified that some activities of a BOC affiliate that is engaged in the provision of electronic publishing services may be unrelated to electronic publishing.[270] According to BellSouth, a BOC therefore may engage in joint marketing activities with its directory affiliate so long as such activities "relate to the traditional directory products of the directory affiliate rather than any electronic directory products."[271] SBC argues that section 274(c)(1)(B) does not apply if a BOC performs services for an affiliate that are unrelated to the provision of electronic publishing.[272]

119. U S WEST, in contrast, argues that the phrase "that is related to the provision of electronic publishing" modifies "affiliate" because such an interpretation provides BOCs with greater flexibility in organizing their businesses and is consistent with congressional intent.[273] For example, U S WEST contends that, if we adopt this interpretation, a BOC choosing to provide electronic publishing services through a section 272 affiliate would be subject to the joint marketing provisions of section

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[268] Ameritech at 18; BellSouth at 17; SBC at 11.

[269] BellSouth at 17.

[270] Id.

[271] Id.

[272] SBC at 11.

[273] U S WEST at 7.

274(c)(1)(B), rather than section 272.[274]

3) Discussion

120. We conclude that the phrase "that is related to the provision of electronic publishing" modifies the "promotion, marketing, sales, or advertising" activities that are circumscribed by section 274(c)(1)(B). As such, we interpret section 274(c)(1)(B) of the Act to prohibit a BOC from carrying out any promotion, marketing, sales or advertising activities with an affiliate, if such activities "relate to" the provision of electronic publishing.[275] As an initial matter, we find that the joint marketing prohibition in section 274(c)(1)(B) is intended to address situations that are not otherwise covered by section 274(c)(1)(A). Consequently, [5412] we conclude that section 274(c)(1)(B) contemplates situations in which a BOC affiliate is involved in the provision of services that are in some manner "related to" the provision of electronic publishing, but does not provide electronic publishing services disseminated by means of a BOC's or any of its affiliates' basic telephone service. Because a BOC or BOC affiliate may engage in the provision of electronic publishing that is disseminated by means of such BOC's or any of its affiliates' basic telephone service only through a separated affiliate or an electronic publishing joint

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[274] We note that, while U S WEST argues that the phrase "that is related to the provision of electronic publishing" modifies the word "affiliate" in section 274(c)(2)(B), it also contends that this interpretation would permit the section 274 joint marketing restrictions to be applied only to the electronic publishing activities of a section 272 affiliate. In that respect, therefore, U S WEST's argument is similar to those of commenters supporting a contrary semantic interpretation of the phrase.

[275] The term "affiliate" is defined in section 274(i)(1) as "any entity that, directly or indirectly, owns or controls, is owned or controlled by, or is under common ownership or control with, a Bell operating company. Such term shall not include a separated affiliate." 47 U.S.C. § 274(i)(1).

venture,[276] a BOC "affiliate" that falls under section 274(c)(2)(B) of the Act, by definition, must not engage in such provision of electronic publishing. A BOC affiliate that provides electronic publishing services by means of its basic telephone service would constitute a "separated affiliate" subject to the joint marketing restriction in section 274(c)(1)(A).

121. Consequently, section 274(c)(2)(B) addresses situations in which a BOC may have, for example, an affiliated holding company that, in turn, holds an ownership interest in a separated affiliate. Such a BOC would be precluded from carrying out any promotion, marketing, sales or advertising activities for or in conjunction with that affiliated holding company if and to the extent that such activities are "related to the provision of electronic publishing." A BOC, however, would not be prohibited from engaging in marketing activities with the affiliated holding company that are unrelated to the provision of electronic publishing. This interpretation of section 274(c)(1)(B) effectively would prevent the BOCs from indirectly promoting, marketing, selling, or advertising the electronic publishing services of a separated affiliate.

122. We reject U S WEST's contention that section 274(c)(1)(B) prohibits a BOC from carrying out marketing activities for or with an affiliate that is related to the provision of electronic publishing. Given the definition of "separated affiliate," which contemplates the provision of electronic publishing services by such entity, it is difficult to conceive of an affiliate "related to the provision of electronic publishing" that would not otherwise constitute a separated affiliate, and thus be subject to the joint marketing restriction in section 274(c)(1)(A). We also reject BellSouth's contention that section 274(c)(1)(B) of the Act is intended to address situations in which a BOC

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[276] See 47 U.S.C. § 274(a).

provides electronic publishing and non-electronic publishing services through one affiliate. As noted above, a BOC affiliate that provides electronic publishing services through the BOCs' or any of its affiliates' basic telephone service would constitute a "separated affiliate" that would be subject to the joint marketing prohibition in section 274(c)(1)(A).

[5413] b. Scope of Section 274(c)(1)(A)

1) Background

123. We sought comment in the Notice on whether a BOC can carry out both section 272 and section 274 activities through one entity or affiliate, and, if so, whether the affiliate would have to comply with the requirements of section 272, section 274, or both.[277] We conclude in this Order that a BOC may provide both section 272 and section 274 services through the same affiliate. In so doing, however, a BOC must comply with the structural and transactional requirements of both sections 272(b) and 274(b).[278] We also conclude that a BOC providing section 272 and section 274 services through the same affiliate must comply with the applicable joint marketing provisions and nondiscrimination provisions of both those sections.[279]

124. Some parties raised the issue of whether and to what extent the joint marketing restrictions of section 274 apply in cases where a BOC provides through the same affiliate electronic publishing services and non-electronic publishing services, i.e., print directory services, that do not fall under section 272 of the

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[277] Notice at ¶ 48.

[278] See supra at ¶¶ 110-115.

[279] Id.

Act.[280] Because BOCs currently may be providing electronic publishing and such non-electronic publishing services through one affiliate, or may wish to provide such services through one entity in the future, we address that issue in this Order.

2) Comments

125. U S WEST and BellSouth argue that, if a BOC provides electronic publishing services and non-electronic publishing services, such as print directory services, through the same affiliate, the joint marketing restrictions of section 274 would apply only to the electronic publishing activities of the affiliate.[281] U S WEST argues, inter alia, that Congress, in adopting the prohibitions in section 274(c)(1) of the Act, intended to circumscribe, for a limited time, joint marketing activities between a BOC and its section 274 separated affiliate because such affiliate would use the BOC's basic telephone service to disseminate its electronic publishing services.[282] U S WEST argues that the section 274 joint marketing [5414] prohibitions thus were intended to restrict the BOCs' ability to "leverage those basic services to favor its electronic publishing services which use [such] services."[283] U S WEST maintains therefore that, absent a connection between a publishing activity and the BOC's network operations, there is no indication that Congress meant to impede commercial speech activities engaged in by a BOC corporate enterprise.[284]

3) Discussion

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[280] See U S WEST at 8-11; BellSouth ex parte letter, October 15, 1996.

[281] Id.

[282] U S WEST at 9-10.

[283] Id. at 10.

[284] Id.

126. We conclude that, while a BOC may provide through the same affiliate both electronic publishing services and non-electronic publishing services, such as print directory services, which do not fall under section 272 of the Act, it must comply with the joint marketing requirements of section 274. The plain language of section 274(c)(1)(A) states that "a [BOC] shall not carry out any promotion, marketing, sales, or advertising for or in conjunction with a separated affiliate."[285] Section 274(c)(1)(A), therefore, precludes a BOC from engaging in certain activities with a separated affiliate as a corporate entity, even in connection with non-electronic publishing services.

127. While our interpretation could provide a disincentive for BOCs to offer electronic publishing and non-electronic publishing services through the same affiliate, as U S WEST points out,[286] the unambiguous statutory language requires this interpretation. We thus conclude that section 274(c)(1)(A) prohibits marketing and sales-related activities carried out by a BOC for or in conjunction with a separated affiliate, irrespective of whether such affiliate provides both electronic publishing services and non-electronic publishing services, such as print directory services, that do not fall under section 272 of the Act.

c. Activities Prohibited under Section 274(c)(1)

1) Background

128. In the Notice, we observed that the activities proscribed by section 274(c)(1) include the "promotion, marketing, sales, or advertising" by a BOC for or with an affiliate.[287] We tentatively

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[285] 47 U.S.C. § 274(c)(1)(A) (emphasis added).

[286] U S WEST at 10.

[287] Notice at ¶ 53.

concluded that such activities "encompass prohibitions on advertising the availability of local exchange or other BOC services together with the BOC's electronic publishing services, making those services available from a single source and providing [5415] bundling discounts for the purchase of both electronic publishing and local exchange services."[288] We sought comment on that tentative conclusion and on whether any other types of prohibitions were contemplated.[289]

2) Comments

129. Ameritech, AT&T and NAA generally agree with our tentative conclusion regarding the types of activities that are prohibited under sections 274(c)(1)(A) and (B) of the Act.[290] Ameritech also argues, however, that the only prohibited marketing activities are those that "involve the BOC and the electronic publishing affiliate working together,"[291] and therefore nothing precludes unilateral marketing, promotion, or sales activities by either the BOC or its separated affiliate.[292] In addition, Ameritech contends that bundling discounts may be offered in all cases of permissible joint marketing activities.[293] According to Ameritech, "while the BOC requires regulatory authority to discount regulated services, the electronic publisher is free to set its unregulated price -- and any promotional

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[288] Id.

[289] Id.

[290] Ameritech at 16; AT&T at 20; NAA at 6.

[291] Ameritech at 16.

[292] Id. Ameritech argues, for example, that section 271(c)(1) does not prohibit a BOC from unilaterally purchasing an electronic ad for its services in the electronic publishing affiliate's Internet service, because such action does not involve a "coordinated effort" with the electronic publishing affiliate to jointly promote both the BOC's and the electronic publisher's services. Id.

[293] Ameritech Reply at 17.

discounts -- as it sees fit."[294] AT&T disputes Ameritech's contention that section 274(c)(1) of the Act permits a BOC to market the electronic publishing services of its separated affiliate so long as it does not "coordinate" its promotional activities with such affiliate.[295]

130. U S WEST generally agrees that the activities prohibited under sections 274(c)(1)(A) and (B) of the Act include making local exchange or other BOC services available together with electronic publishing services, but states that this prohibition is subject to the inbound telemarketing exception in section 274(c)(2)(A) of the Act.[296] PacTel argues that a separated affiliate, electronic publishing joint venture, teaming or other business entity is not precluded from purchasing the telecommunications services of a BOC and then [5416] advertising such services with electronic publishing services, making the services available from a single entity, and providing bundled discounts.[297]

131. A number of parties contend that sections 274(c)(1)(A) and (B) of the Act prohibit only the BOCs from carrying out certain joint marketing activities, and that the provisions should not be interpreted to restrict the joint marketing activities that may be carried out by either a "separated affiliate" under section 274(c)(1)(A), or an "affiliate" under section 274(c)(1)(B).[298] SBC specifically argues that the statute should not be interpreted to impose any restrictions on a separated affiliate's ability "to

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[294] Id.

[295] AT&T Reply at 17.

[296] U S WEST at 15.

[297] PacTel Reply at 11.

[298] Bell Atlantic at 9; NYNEX Reply at 9; SBC Reply at 14; USTA at 5; YPPA Reply at 7.

market and sell services or products of the BOC, or those of any other affiliate or an unrelated party."[299] Bell Atlantic similarly contends that an affiliate is not prohibited under the statute "from marketing the BOC's services and products or acting as a single point of contact for the customer."[300]

132. NYNEX and YPPA argue that permitting a separated affiliate to market jointly its electronic publishing services with BOC telecommunications services would allow customers to realize the benefits of one-stop shopping.[301] In addition, NYNEX and PacTel maintain that imposing marketing restrictions on a BOC separated affiliate that do not also apply to such affiliate's competitors would place the separated affiliate at a competitive disadvantage.[302] A number of parties also contend that nothing in the Act prohibits a BOC affiliate from carrying out joint marketing activities as an agent for either or both the BOC and the separated affiliate.[303]

133. Conversely, AT&T and Time Warner argue that the marketing prohibitions in section 274(c)(1) should not be construed to apply only to the marketing activities of the BOC.[304] According to AT&T, allowing a separated affiliate to market jointly its electronic publishing services with BOC telecommunications services would allow the BOC to "move its entire marketing department into the separated affiliate" in violation of the statutory prohibition against a BOC carrying out any marketing 'in conjunction with' a separated [5417]

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[299] SBC Reply at 14.

[300] Bell Atlantic at 9.

[301] NYNEX Reply at 10; YPPA at 6-7.

[302] NYNEX at 19; PacTel Reply at 11.

[303] NYNEX Reply at 9-10 n.23; SBC Reply at 15; USTA at 5.

[304] AT&T Reply at 17; Time Warner Reply at 4.

affiliate."[305] Time Warner similarly states that interpreting section 274(c)(1) to apply only to the BOCs would allow the BOCs to circumvent the joint marketing restrictions of section 274.[306]

3) Discussion

134. As an initial matter, we conclude that the prohibitions in section 274(c)(1) apply only to activities carried out by a BOC. Sections 274(c)(1)(A) and (B) of the Act only proscribe BOC activities.[307] We also find that neither a separated affiliate under section 274(c)(1)(A), nor an affiliate under section 274(c)(1)(B), is prohibited from marketing its services together with BOC telecommunications services, so long as such marketing activity is performed unilaterally by the separated affiliate or affiliate, respectively. Thus, a separated affiliate or affiliate is permitted under sections 274(c)(1)(A) and (B) to market its electronic publishing services with basic telephone service purchased from the BOC. We conclude that this type of marketing, in which a separated affiliate or affiliate unilaterally markets BOC local exchange service as an input to its electronic publishing services, is not prohibited under sections 274(c)(1)(A) or (B). We specify that marketing by the separated affiliate or affiliate must be unilateral not because section 274(c)(1) directly imposes any marketing restrictions on such entities, but, as a practical matter, because section 274(c)(1) bars a BOC from carrying out "marketing . . . for or in conjunction with" such separated affiliates or affiliates.[308]

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[305] AT&T Reply at 17.

[306] Time Warner Reply at 4-5.

[307] See 47 U.S.C. §§ 274(c)(1)(A), (B).

[308] Id.

135. We reject AT&T's and Time Warner's contention that permitting a separated affiliate to market BOC telecommunications services would allow a BOC to circumvent the restrictions of section 274. As noted above, section 274(c)(1), by its terms, applies only to activities carried out by a BOC. While AT&T's and Time Warner's arguments pertain only to a "separated affiliate," we have no basis for concluding that Congress intended to apply the restrictions in sections 274(c)(1)(A) and (B) to either separated affiliates or affiliates, respectively. Moreover, based on the plain language of sections 274(c)(1)(A) and (B), which prohibits a BOC from carrying out any "promotion, marketing, sales, or advertising for or in conjunction with" a separated affiliate or affiliate, a BOC would be precluded from, for example, "moving its entire marketing department into the separated affiliate" in order to circumvent the section 274(c)(1) restrictions.[309]

[5418] 136. Based on the above analysis, we also find that a BOC affiliate may carry out "promotion, marketing, sales, or advertising" activities as an agent for either a "separated affiliate" under section 274(c)(1)(A), or another "affiliate" under section 274(c)(1)(B). Because neither a separated affiliate nor an affiliate is subject to the restrictions in sections 274(c)(1)(A) and (B) of the Act, a BOC affiliate that acts as an agent for such separated affiliate or affiliate also is not subject to those restrictions. As in the case of a separated affiliate or affiliate, however, the scope of the agent's activities may be limited, as a practical matter, by the legal bar on a BOC carrying out promotion, marketing, sales or advertising activities "for or in conjunction with" such affiliates. We conclude, however, that because section 274(c)(1)(A) applies to activities carried out by BOCs, a BOC affiliate is prohibited from acting as an agent for the BOC in performing marketing and sales-related activities under that section, contrary to

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[309] See AT&T Reply at 17.

arguments raised by some parties. We also note that, under the definition of "Bell operating company" in section 274(i)(10), a BOC includes "any entity or corporation that is owned or controlled by" such BOC.[310] As such, the section 274(c)(1) joint marketing prohibitions applicable to BOCs also would apply to entities that are owned or controlled by a BOC, such as an entity that acts as an agent for a BOC.

137. We also conclude, based on their language, that sections 274(c)(1)(A) and (B) of the Act prohibit a BOC or BOC agent from advertising local exchange or other BOC services together with electronic publishing services, making those services available from a single point of contact and providing bundling discounts for the purchase of both electronic publishing and local exchange services, except as permitted under section 274(c)(2) of the Act.[311] Since section 274 only proscribes BOC activities, however, we conclude, consistent with our discussion above, that these activities may be carried out by a separated affiliate or affiliate, subject only to the practical limitation that a BOC may not participate owing to the legal bar on its ability to carry out promotion, marketing, sales or advertising activities "for or in conjunction with" a separated affiliate or an affiliate.

138. In our Non-Accounting Safeguards Order implementing sections 271 and 272 of the Act, we recognized that "bundling" contemplates the offering of BOC resold local exchange services and interLATA services as a package under an integrated pricing schedule.[312] As a result, we concluded that the concept of "bundling" includes "providing a discount if a customer purchases both interLATA services and BOC resold local services, conditioning the purchase of one type of service on the

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[310] 47 U.S.C. § 274(i)(10).

[311] See infra Part III.C.2.a. and III.C.2.c.

[312] Non-Accounting Safeguards Order at ¶ 277.

purchase of the other, and offering both interLATA services and BOC resold local services as a single combined product."[313]

[5419] 139. Based on the definition of "bundling" in our Non-Accounting Safeguards Order, we conclude that "bundling" refers to the offering by a BOC or BOC agent of BOC local exchange and electronic publishing services as a package under an integrated pricing schedule. This restriction flows not only from section 274(c)(1), but from the fact that a BOC is forbidden by section 274(a) to engage in the provision of electronic publishing disseminated by means of its basic telephone service except through a separated affiliate or an electronic publishing joint venture. By providing such bundled services, the BOC or its agent would be engaged in the provision of electronic publishing in contravention of section 274(a). We further find, consistent with the Non-Accounting Safeguards Order, that sections 274(c)(1)(A) and (B) of the Act prohibit a BOC or BOC agent from providing customer discounts for the purchase of local exchange and electronic publishing services, conditioning the purchase of one type of service on the other, or offering both electronic publishing and local exchange services as one product. Moreover, we conclude, based on the explicit language of section 274(c)(1), that sections 274(c)(1)(A) and (B) of the Act prohibit a BOC or BOC agent not only from offering for sale both local exchange and electronic publishing services, but also from advertising those services in a single advertisement, and from selling both services through a single point of contact, e.g., a single sales agent, except as permitted under section 274(c)(2).[314] We find that Congress intended to proscribe those activities in adopting sections 274(c)(1)(A) and (B) of the Act.

d. Interplay Between Section 274 Joint Marketing Provisions

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[313] Id.

[314] See infra Part III.C.2.a. and III.C.2.c.

and Other Provisions of the Act

1) Background

140. In the Notice, we sought comment on whether and to what extent the joint marketing provisions in section 272(g) and the customer proprietary network information (CPNI) provisions in section 222 of the Act affect implementation of section 274.[315]

2) Comments

141. NYNEX argues that, because the marketing provisions in sections 272 and 274 of the Act apply to different services, the restrictions in section 274 should not be applied to the services and facilities provided under section 272.[316] PacTel maintains that sections 272(g) and 222 of the Act do not affect implementation of section 274.[317] U S WEST maintains that, based on implied consent gleaned from either the business relationship or [5420] customer notification, CPNI may be used by the BOC in marketing a separated affiliate's electronic publishing offerings.[318] U S WEST also contends that, under section 222(d)(3) of the Act, a BOC could use CPNI on an inbound telemarketing call for both telecommunications and electronic publishing services of the BOC and third parties, provided the customer consented to such use on the call.[319]

3) Discussion

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[315] Notice at ¶ 53.

[316] NYNEX at 19.

[317] PacTel at 14.

[318] U S WEST at 17. U S WEST notes, however, that CPNI could not necessarily be used with respect to comparable electronic publishing offerings of others without customer consent. Id.

[319] U S WEST at 17-18.

142. As discussed above, we conclude that, while a BOC may provide through the same affiliate both section 272 and section 274 services, it must comply with the applicable joint marketing restrictions of both those sections. We decline to address arguments raised in this proceeding regarding the interplay between section 274 and section 222 of the Act, relating to privacy of customer information. The Commission has pending a proceeding to implement section 222 of the Act.[320] Until the completion of that proceeding, we defer any decision on the extent, if any, that section 222 of the Act affects implementation of section 274. As noted in the CPNI NPRM, the CPNI requirements the Commission previously established in the Computer II and Computer III proceedings[321] remain in effect pending the outcome of the CPNI proceeding, to the extent that they do not conflict with section 222 of the Act.[322]

2. Permissible Joint Activities -- Section 274(c)(2)

a. Joint Telemarketing -- Section 274(c)(2)(A)

1) Background

143. As we observed in the Notice, section 274(c)(2) of the Act permits three types of joint activities between a BOC and a separated affiliate, electronic publishing joint venture, affiliate, or unaffiliated electronic publisher under specified conditions.[323] Under section 274(c)(2)(A) of the Act, a BOC may provide

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[320] See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket 96-115, Notice of Proposed Rulemaking, 11 FCC Rcd 12513 ("CPNI NPRM").

[321] See discussion of Computer II and Computer III infra at ¶ 189.

[322] CPNI NPRM at ¶ 3.

[323] Notice at ¶ 54.

"inbound telemarketing or referral services [5421] related to the provision of electronic publishing for a separated affiliate, electronic publishing joint venture, affiliate or unaffiliated electronic publisher: provided, that if such services are provided to a separated affiliate, electronic publishing joint venture, or affiliate, such services shall be made available to all electronic publishers on request, on nondiscriminatory terms."[324]

144. We stated in the Notice that the statute is silent as to the specific obligations section 274(c)(2)(A) imposes on a BOC.[325] We noted that the term "inbound telemarketing" is defined in section 274(i)(7) as "the marketing of property, goods, or services by telephone to a customer or potential customer who initiated the call."[326] The term "referral services," however, is not defined in the statute. As we discussed in the Notice, the Joint Explanatory Statement states that the Conference Committee adopted the provisions of the House bill relating to electronic publishing, with some modifications relating to sunset of the section 274 requirements and use of BOC trademarks by separated affiliates and electronic publishing joint ventures.[327] The provision of the House bill relating to electronic publishing joint ventures was identical to the provision ultimately adopted by the Conference Committee.

145. The Committee Report accompanying H.R. 1555 states that:

> Subsection (c)(2)(A) permits a BOC to provide inbound telemarketing or referral services related to the provision of

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[324] 47 U.S.C. § 274(c)(2)(A).

[325] Notice at ¶ 55.

[326] 47 U.S.C. § 274(i)(7).

[327] Joint Explanatory Statement at 156.

> electronic publishing, if the BOC provides the same service on the same terms and conditions, and prices to non-affiliates as to its affiliates. The term 'inbound telemarketing or referral services' is defined . . . to mean 'the marketing of property, goods, or services by telephone to a customer or potential customer who initiated the call.' Thus, a BOC may refer a customer who seeks information on an electronic publishing service to its affiliate, but must make sure that the referral service is available to unaffiliated providers. No outbound telemarketing or similar activity, under which the call is initiated by the BOC or its affiliate or someone on its behalf, is permitted.[328]

[5422] In the Notice, we sought comment on whether the conditions imposed on inbound telemarketing discussed in the House Report should be adopted, and whether we should adopt any regulations pertaining to outbound telemarketing.[329]

2) Comments

146. AT&T argues that we should adopt the conditions on inbound telemarketing discussed in the House Report, i.e., that a BOC may offer inbound telemarketing services to its affiliate only if it makes those services available to unaffiliated providers of electronic publishing services on the same terms, conditions and prices.[330] In addition, it contends that a BOC should be prohibited from engaging in outbound telemarketing, consistent with the House Report.[331] AT&T argues that section 274(c)(2)(A) should not be construed as an "open-ended

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[328] See H.R. Rep. 104-204, 104th Cong., 1st Sess. 86 (1995) ("House Report" or "Report").

[329] Notice at ¶ 55.

[330] AT&T at 20; see also YPPA at 7.

[331] AT&T at 20.

authorization for the BOCs to market the electronic publishing services of their separated affiliates" because such an interpretation would result in the exception swallowing the rule.[332] While NAA agrees that we should adopt the conditions on inbound telemarketing discussed in the House Report, it also argues that a BOC may provide outbound telemarketing services to an electronic publishing joint venture under section 274(c)(2)(C).[333]

147. Conversely, the BOCs generally contend that they are permitted to engage in a broader range of marketing activities under section 274(c)(2)(A). In particular, Ameritech argues that section 274(c)(2)(A) expressly authorizes a BOC to handle all aspects of the electronic publisher's sales process while on an inbound telephone call.[334] NYNEX similarly maintains that section 274(c)(2)(A) does not restrict in any way the inbound telemarketing services that a BOC may provide to a separated affiliate, electronic publishing joint venture or affiliate, except to require the BOC to make such services available to all electronic publishers "on request, on nondiscriminatory terms."[335] In

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[332] AT&T Reply at 18.

[333] NAA at 7.

[334] Ameritech at 20; see also U S WEST Reply at 10. According to Ameritech, this includes: (1) promoting the publisher's services and quoting prices; (2) consummating a sale; (3) obtaining sales-related information; (4) obtaining credit information; (5) forwarding all such information to the publisher; and (6) promoting the BOC's services to work in conjunction with the electronic publisher's services. Id.

[335] NYNEX at 20-21. NYNEX therefore argues that section 274(c)(2)(A) should be interpreted to permit a BOC to engage in any of the following inbound telemarketing activities on a nondiscriminatory basis: (1) handle, as an agent for the separated affiliate providing the electronic publishing services, incoming telephone calls from customers or potential customers requesting products or services; (2) use a toll-free number provided by the separated affiliate for use by customers or potential customers of the

addition, SBC argues that section [5423] 274(c)(2)(A) allows a BOC not only to refer a customer who requests information regarding an electronic publishing service to its affiliate, but also permits a BOC to market electronic publishing services to customers who inquire about them.[336] SBC also argues that section 274(c)(2)(A) "allow[s] a separated affiliate or a BOC to advertise a BOC call-in number to which potential customers might choose to initiate a call."[337] BellSouth argues that section 274(c)(2)(A) of the Act is clear on its face, and therefore "no further elucidation" of that section is necessary.[338]

148. PacTel argues that section 274(c)(2)(A)'s requirement that inbound telemarketing or referral services "be made available to all electronic publishers on request, on nondiscriminatory terms" means that the terms of the service must be generally available to all similarly situated electronic publishers.[339] U S WEST argues that the requirement should be construed to apply only to services that are of "like kind."[340]

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separated affiliate; (3) respond to incoming calls using the separated affiliate's name and, if possible, a script approved in advance by the separated affiliate; (4) answer customer questions, provide information and take orders for products or services using data procedures provided or approved by the separated affiliate; and (5) process orders for fulfillment by the separated affiliate and forward such orders to the separated affiliate. Id.

[336] SBC at 13-14.

[337] Id.

[338] BellSouth at 18.

[339] PacTel at 15.

[340] U S WEST at 11. U S WEST argues, for example, that, if a section 274 affiliate offered an electronic travel bureau service to which U S WEST made referrals on an in-bound calling basis, section 274(c)(2)(A) could be interpreted to require U S WEST to refer callers to all other electronic publishers, upon request, regardless of whether the services provided by such electronic publishers were comparable to those of U S WEST's section 274 affiliate. Id. at 14.

PacTel contends that section 274(c)(2)(A), like section 202(a) of the Act, allows reasonable discrimination.[341] Conversely, Time Warner argues that nothing in the Act indicates that Congress intended to limit the provision of inbound telemarketing or referral services required by section 274(c)(2)(A) to competing electronic publishers offering services "comparable" to those offered by a BOC separated affiliate.[342]

[5424] 3) Discussion

149. We conclude that a BOC may, pursuant to section 274(c)(2)(A), both provide "referral services" and "market" property, goods, or services related to the provision of electronic publishing by telephone to a customer or potential customer who initiated the call. This is consistent with the plain language of the statute, including the definition of "inbound telemarketing" in section 274(i)(7), and with the legislative history interpreting section 274(c)(2)(A). We also conclude, however, consistent with the clear language of the statute and with the House Report, that, to the extent a BOC provides inbound telemarketing or referral services for a separated affiliate, electronic publishing joint venture, or affiliate, it must make available "such services . . . to all electronic publishers on request, on nondiscriminatory terms."[343] Consistent with the legislative history, this means that the BOC must offer "the same service on the same terms and conditions, and prices to non-affiliates as to its affiliates."[344]

150. A BOC may choose to provide inbound telemarketing or referral services either pursuant to a contractual arrangement or

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[341] PacTel at 15.

[342] Time Warner Reply at 8.

[343] 47 U.S.C. § 274(c)(2)(A).

[344] House Report at 86.

during the normal course of its inbound telemarketing operations. To the extent a BOC chooses either or both of these approaches in providing inbound telemarketing or referral services to a separated affiliate, electronic publishing joint venture or affiliate, we conclude, based on the nondiscrimination proviso in section 274(c)(2)(A), that it must make available the same approach to unaffiliated electronic publishers.

151. With regard to inbound telemarketing or referral services provided by a BOC to its separated affiliate, electronic publishing joint venture, or affiliate pursuant to a contractual arrangement, we find that the BOC must make available the same terms, conditions, and prices for such services to unaffiliated electronic publishers, except to the extent legitimate price differentials may exist. For example, such price differentials may reflect differences in cost, or may reflect the fact that an unaffiliated electronic publisher has requested superior or less favorable treatment in exchange for paying a higher or lower price to the BOC. As we stated in the First Interconnection Order, where costs differ, rate differences that accurately reflect those differences are not unlawfully discriminatory.[345] We similarly conclude that price differences, "when based upon legitimate variations in costs, are [5425] permissible under the 1996 Act when justified."[346] PacTel's argument that the "nondiscriminatory" requirement in section

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[345] Implententation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order ¶ 860, 11 FCC Rcd 15499, 15928 (1996) (First Interconnection Order), Order on Reconsideration, 11 FCC Rcd 13042 (1996) (First Reconsideration), further recon. pending, pet. for review sub nom. and partial stay granted, Iowa Utilities Board v. FCC, No. 96-3221 and consolidated cases (8th Cir. filed Sept. 6, 1996), partial stay lifted in part, Iowa Utilities Board v. FCC, No. 96-3321 and consolidated cases, 1996 WL 589284 (8th Ctr. Oct. 15, 1996).

[346] Id.

274(c)(2)(A) means that the terms of the service must be generally available to all "similarly situated" electronic publishers, therefore, has merit to the extent that price differences among electronic publishers reflect legitimate differences in cost.

152. The statute requires that, to the extent a BOC markets property, goods or services related to the provision of electronic publishing to a customer, or refers a customer to a separated affiliate, electronic publishing joint venture or affiliate during the normal course of its telemarketing operations, it must provide such marketing or referral services to all unaffiliated electronic publishers requesting such services, on nondiscriminatory terms. Thus, to the extent that a BOC provides referral service if a customer has not initially independently requested a specific referral to the BOC affiliate, a BOC must provide the names of all such unaffiliated electronic publishers, as well as its own affiliated electronic publishers, in random order, to the customer. A similar standard may also be appropriate for particular inbound telemarketing activities. We find that our interpretation is consistent with the intent of section 274(c)(2)(A) to ensure that a BOC providing inbound telemarketing or referral services to a separated affiliate provides such services on a nondiscriminatory basis to all unaffiliated electronic publishers.

153. We reject U S WEST's argument that imposing such a requirement on the BOCs with respect to referral services would be overly burdensome.[347] We note, for example, that BOCs currently are subject to similar requirements in cases where a new local exchange customer of the BOC requests information regarding interexchange service. In such cases, BOCs are required, inter alia, to provide customers with the names and, if requested, the telephone numbers of carriers offering

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[347] See U S WEST at 14.

interexchange services.[348] As part of this requirement, a BOC must ensure that the names of the interexchange carriers are provided in random order.[349]

154. We disagree with U S WEST's contention that a BOC's obligation to provide inbound telemarketing or referral services under section 274(c)(2)(A) applies only with respect to services that are "comparable" to those of its separated affiliate. We conclude that a BOC's obligation under section 274(c)(2)(A) to make available inbound telemarketing and referral services on a nondiscriminatory basis requires that a BOC make available to unaffiliated electronic publishers the same services it provides to an affiliated electronic [5426] publisher, regardless of whether the unaffiliated electronic publishers offer services that are "comparable" to those of the BOC. Nothing in the statute or its legislative history indicates that a BOC must make available inbound telemarketing and referral services only to electronic publishing entities providing services "comparable" to those of the BOC's affiliate. To the extent that a BOC's agreement with its affiliated electronic publisher is limited to certain types of marketing or referral services, however, the BOC is then only obligated to make the same types of marketing or referral services available to unaffiliated electronic publishers.

155. With respect to AT&T's concern that interpreting section 274(c)(2)(A) to allow BOCs to "market" the electronic publishing services of their separated affiliates would circumvent the joint marketing prohibitions in section 274(c)(1), we find that the unambiguous statutory definition of "inbound telemarketing" in section 274(i)(7), and the fact that the general prohibition in section 274(c)(1) applies "except as provided in paragraph (2)

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[348] See Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, 101 F.C.C.2d 935, 950 (rel. Aug. 20, 1985).

[349] Id. at 950.

[274(c)(2)]," requires this interpretation. We note that the statutory language allows BOCs to provide such marketing services only on nondiscriminatory terms, as discussed above. In addition, while our interpretation of the nondiscriminatory requirement may serve as a disincentive for certain BOCs to market the services of an affiliated electronic publisher on an inbound call, we find that the statutory language compels this interpretation.

156. Finally, we conclude that section 274(c)(2)(A) prohibits outbound telemarketing or similar activities in which a call is initiated by a BOC, its affiliate, or someone on its behalf. Because section 274(c)(2)(A). by its terms, applies only to "inbound telemarketing" or referral services related to the provision of electronic publishing, we believe that Congress did not intend to permit BOCs to engage in outbound telemarketing activities in adopting section 274(c)(2)(A). To the extent that the statutory language leaves any ambiguity on this question, the House Report supports our interpretation that a BOC is prohibited under section 274(c)(2)(A) from engaging in outbound telemarketing.[350] We also believe that allowing a BOC to engage in outbound telemarketing activities to promote the electronic publishing services of its separated affiliate would eviscerate the general prohibition on BOC joint marketing activities in section 274(c)(1)(A) of the Act.

b. Teaming Arrangements - Section 274(c)(2)(B)

1) Background

157. In the Notice, we observed that, in addition to certain joint telemarketing activities, a BOC is permitted to engage in "teaming" or "business arrangements" to provide electronic

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[350] See House Report at 86.

publishing services under certain conditions pursuant to section 274(c)(2)(B).[351] [5427] Section 274(c)(2)(B) specifically states that a "[BOC] may engage in nondiscriminatory teaming or business arrangements to engage in electronic publishing with any separated affiliate or with any other electronic publisher if (i) the [BOC] only provides facilities, services, and basic telephone service information[352] as authorized by this section, and (ii) the [BOC] does not own such teaming or business arrangement."[353]

158. We sought comment in the Notice on what types of arrangements are encompassed by the terms "teaming" or "business arrangements,"[354] and on the significance of section 274(c)(2)(B)'s placement under the "Joint Marketing" provisions in section 274(c).[355] We also sought comment on what regulations, if any, are necessary to ensure that the arrangements in which BOCs engage pursuant to section 274(c)(2)(B) are "nondiscriminatory," and on how the provision of "basic telephone service information" under that section relates to the requirements in section 222 for access to and use of CPNI.[356]

2) Comments

159. Ameritech, NAA, NYNEX, and PacTel generally argue that the terms "teaming" or "business arrangements" in section

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[351] Notice at ¶ 56.

[352] "Basic telephone service information" is defined in section 274 as "network and customer information of a [BOC] and other information acquired by a [BOC] as a result of its engaging in the provision of basic telephone service." 47 U.S.C. § 274(i)(3).

[353] 47 U.S.C. § 274(c)(2)(B).

[354] Notice at ¶ 56.

[355] Id. at ¶ 57.

[356] Id.

274(c)(2)(B) contemplate a broad range of permissible activities.[357] Ameritech argues that, so long as all the conditions under section 274(c)(2)(B) are met and the requirements of section 274 are otherwise satisfied, a BOC should be free to enter into a teaming or business arrangement with a separated affiliate or electronic publishing joint venture to jointly market electronic publishing services.[358] NYNEX [5428] contends that teaming arrangements provide another form of "one-stop shopping" for consumers and present minimal risk of anticompetitive behavior.[359] PacTel argues that the language of section 274(c)(2)(B) is so broad that it includes any activity other than the provision of electronic publishing itself, including promotion, marketing, sales and advertising activities.[360] SBC argues that section 274(c)(2)(B) should be interpreted to permit a BOC and its separated affiliate jointly to promote, market, sell, and advertise their respective services pursuant to any form of business arrangement.[361]

160. Bell Atlantic argues that the term "teaming or business

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[357] Ameritech at 22; NAA at 8: NYNEX at 22: PacTel at 16-17. NYNEX specifically argues that, under section 274(c)(2)(B), a BOC and its separated affiliate are permitted to engage in the following teaming activities: (1) provide to a customer, and contract separately with that customer for, regulated telephone service and electronic publishing services, respectively; (2) make joint sales calls through premises visits or telemarketing, and plan for such sales calls; (3) supply potential customers with copies of sales literature describing each entity's products and services which are the subject of the teaming arrangement; (4) advertise and promote the availability of the products and services offered through the teaming arrangement, so long as the advertising makes clear that the products are separately provided; and (5) coordinate the installation of services. NYNEX at 22-23.

[358] Ameritech at 22; see also NAA at 8; PacTel at 16-17.

[359] NYNEX at 23.

[360] PacTel at 17.

[361] SBC at 15.

arrangements" as used in section 274(c)(2)(B) encompasses myriad arrangements which include, but are not limited to, marketing proposals in which a BOC and an electronic publisher each prepares its portion of a joint bid to a customer.[362] BellSouth contends that a teaming or business arrangement is more substantial than a coordinated joint marketing or sales campaign or joint bid preparation arrangement, given the statute's reference to BOC ownership in section 274(c)(2)(B).[363] YPPA argues that teaming arrangements, which it asserts were permissible under the MFJ, are any arrangements whereby "two businesses act independently to provide related products or services, but coordinate their activities so that the customer obtains a 'complete' package of the desired products or services."[364] According to YPPA, "teaming" may include joint sales activities (including joint planning for sales calls), through advertising, premise visits or telemarketing."[365]

161. Conversely, Time Warner argues that section 274(c)(2)(B) permits a BOC to engage in a non-BOC owned teaming or business arrangement to provide its electronic publishing affiliate with the necessary facilities and telephone service for electronic [5429] publishing, provided that such facilities and services are offered on a nondiscriminatory basis

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[362] Bell Atlantic at 10.

[363] BellSouth at 19.

[364] YPPA at 8. The term "teaming arrangement," however, does not appear in the MFJ and was never specifically defined by the district court that administered the MFJ.

[365] Id. YPPA argues, for example, that a BOC could team with its separated affiliate, "with the BOC providing a customer with regulated telephone service and the separated affiliate providing the same customer with electronic publishing services, and perhaps interLATA service as well." Id. In addition, YPPA contends that a BOC and a separated affiliate may coordinate advertising activities so that the BOC's and the separated affiliate's separate advertisements appear on the same page of the newspaper. Id. at 8-9.

pursuant to tariffed rates and conditions.[366]

162. Bell Atlantic argues that, by placing section 274(c)(2)(B) under the "Joint Marketing" provisions in section 274(c), Congress intended to clarify that "teaming or business arrangements" are not to be considered joint marketing activities.[367] PacTel argues that "teaming arrangements" are included under the heading of "Joint Marketing" because such arrangements are one of the three categories of exceptions listed under that heading.[368]

163. PacTel argues that the nondiscrimination requirement for teaming and other business arrangements relates to how a BOC provides facilities, services and basic telephone service information to electronic publishers, not to a BOC's choice of teaming partners.[369] Even if the nondiscrimination requirement were interpreted to apply to a BOC's choice of teaming partners, PacTel argues, a BOC nevertheless would retain discretion to team only with electronic publishers that met its reasonable standards.[370] BellSouth similarly contends that the nondiscrimination obligation of section 274(c)(2)(B) precludes a BOC from giving preference to the teaming or business arrangement in the conduct of its regulated common carrier activities, but does not impose on the BOC an obligation to invest in a particular entity.[371] SBC argues that the nondiscrimination requirement in section 274(c)(2)(B)

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[366] Time Warner at 24.

[367] Bell Atlantic at 10.

[368] PacTel at 17.

[369] Id. at 18.

[370] Id.

[371] BellSouth at 19.

"provide[s] evenhandedness in the BOCs' provision of marketing and other services to [unaffiliated] electronic publishers."[372] YPPA argues that the nondiscrimination requirement means that a teaming arrangement between a BOC and its separated affiliate "cannot be markedly different" from teaming arrangements made available to other electronic publishers.[373]

164. NAA argues that, if a BOC uses its CPNI to provide "basic telephone service information" as part of a teaming arrangement, it is subject to the privacy requirements in [5430] section 222 for access to and use of the CPNI.[374] PacTel states that section 274(c)(2)(B) allows a BOC to use CPNI as part of a teaming arrangement, consistent with section 222 of the Act.[375] PacTel therefore argues that "BOCs can use CPNI with the type of telecommunications service from which the information was derived, and with customer authorization can use it with any service."[376] PacTel maintains that, to the extent that "basic telephone service information" is also CPNI, section 222 of the Act and any implementing regulations the Commission adopts govern the use of such information.[377] To the extent such information is not CPNI, but network information, PacTel argues that a BOC is required to share such information with all electronic publishers with which the BOC teams.[378] SBC argues that, where information qualifies as both "basic telephone service information" under section 274(i)(3) as well as CPNI under section 222(f)(1), the terms of section 274 should prevail over

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[372] SBC at 15-16.

[373] YPPA at 9.

[374] NAA at 8.

[375] PacTel at 18-19.

[376] Id. at 19.

[377] Id.

[378] Id.

the general terms in section 222 of the Act.[379] SBC points out that section 274 of the Act contains no "approval" requirement as a precondition for using, disclosing, or accessing basic telephone service information.[380] As such, SBC argues, a BOC should be permitted to use such information without first obtaining approval under section 222(c)(1) when engaged in permissible teaming or business arrangements.[381]

3) Discussion

165. We decline at this time to adopt specific regulations clarifying the types of arrangements that are contemplated by the terms "teaming or business arrangements" in section 274(c)(2)(B) of the Act. We conclude that those terms, which are not defined in the statute, may encompass a broad range of permissible marketing activities because section 274(c)(2)(B) imposes no explicit marketing limitations. At the same time, however, this provision contains no language that operates to remove business or teaming arrangements from the scope of the prohibitions in section 274(c)(1).[382] We thus find that Congress, in [5431] including the general terms "teaming or business arrangements" in section 274(c)(2)(B), did not intend to limit or expand the types of marketing activities in which BOCs could engage under that section other than those specifically restricted or authorized elsewhere in section 274 (e.g., in section 274(c)(1)).

166. Under section 274(c)(2)(B), therefore, a BOC providing

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[379] SBC at 16-17.

[380] Id. at 17.

[381] Id.

[382] See discussion of the prohibitions in section 274(c)(1), supra at ¶¶ 116-139, and discussion of electronic publishing joint ventures, infra ¶¶ 186-188.

telecommunications services and the electronic publishing provider with which it teams are limited to marketing their respective services. This interpretation is supported by the plain language of section 274(c)(2)(B), which generally provides that a BOC may engage in teaming or business arrangements if such BOC "only provides facilities, services, and basic telephone service information as authorized by [section 274]." Under this interpretation, a BOC is permitted to market only the facilities, services and basic telephone service information that section 274(c)(2)(B) permits the BOC to provide. This interpretation also is supported by a comparison of the text in section 274(c)(2)(B) with the text of sections 274(c)(2)(A) and (C), relating to inbound telemarketing and electronic publishing joint ventures, respectively. Unlike section 274(c)(2)(C), section 274(c)(2)(B) does not specifically permit the authorized entity to engage in joint marketing activities otherwise prohibited to the BOC by section 274(c)(1), i.e., promotion, marketing, sales, and advertising activities. In addition, unlike section 274(c)(2)(A), section 274(c)(2)(B) contains no language that explicitly addresses marketing. We therefore conclude that a BOC participating in a teaming arrangement may not market the electronic publishing services of an electronic publishing provider with which it teams. In addition, the restrictions specifically set forth in section 274(c)(2)(B) would apply, i.e., that such BOC only provide facilities, services and basic telephone service information as authorized by section 274, that the BOC not "own" the teaming or business arrangement, and that the teaming arrangement be "nondiscriminatory."

167. As noted above, a few commenters provide examples of the types of activities they believe are permissible under section 274(c)(2)(B) as a "teaming or business arrangement." Bell Atlantic, for example, contends that such arrangements include, but are not limited to, marketing proposals in which a BOC and an electronic publisher each prepares its portion of a joint bid to

a customer.[383] In addition, YPPA argues that a teaming arrangement is any arrangement whereby "two businesses act independently to provide related products or services, but coordinate their activities so that the customer obtains a 'complete' package of the desired products or services."[384] YPPA states, for example, that a BOC may engage in a teaming arrangement with a separated affiliate whereby the BOC provides a customer with regulated telephone service and the separated affiliate provides the same customer with electronic publishing services.[385] n385 We conclude that nothing in the statute prohibits a BOC from engaging in the types of activities proposed by these commenters, so [5432] long as all of the requirements of section 274, including section 274(c)(2)(B), are satisfied. To the extent issues arise in the future as to whether certain other activities are permissible under section 274(c)(2)(B) as "teaming or business arrangements," we intend to address those issues on a case-by-case basis.

168. We also conclude that section 274(c)(2)(B)'s requirement that a BOC only engage in teaming or business arrangements that are "nondiscriminatory" means that a BOC may provide to the teaming arrangement the necessary facilities, services and basic telephone service information for electronic publishing, provided that such facilities, services and information are offered on a nondiscriminatory basis both to other teaming arrangements and to unaffiliated electronic publishers. Under this interpretation, for example, a BOC would be prohibited from favoring a teaming arrangement with a separated affiliate over an arrangement with an unaffiliated electronic publishing provider in the provision of the BOC's facilities, services and basic telephone service information under section 274(c)(2)(B). We

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[383] Bell Atlantic at 10.

[384] YPPA at 8.

[385] Id.

agree with PacTel and BellSouth that section 274(c)(2)(B) of the Act does not require a BOC to participate in a teaming arrangement with, or to invest in, an electronic publishing provider. Given that a "teaming arrangement" under section 274(c)(2)(B) contemplates that a BOC may hold less than a 10 percent interest in such arrangement,[386] we believe that Congress did not intend to compel a BOC to acquire such an interest in other arrangements simply because the BOC has chosen to participate in a teaming arrangement with an electronic publisher of its choice. In addition, we find that such an interpretation would provide a disincentive for BOCs to engage in teaming arrangements in contravention of the plain language of section 274(c)(2)(B) and the pro-competitive goals of the 1996 Act.

169. We defer to our pending CPNI proceeding the question of whether the term "basic telephone service information" as defined in section 274(i)(3) of the Act includes CPNI as defined in section 222 of the Act. Based on the definition of "basic telephone service information" in section 274(i)(3), however, we conclude that the term includes network information of the BOC.[387] We also defer to our CPNI proceeding the issue of whether section 222 requires a BOC engaged in permissible marketing activities under section 274(c)(2) to obtain customer approval before using, disclosing, or permitting access to CPNI. In particular, we defer to that proceeding the issue of whether or to what extent section 274(c)(2)(B) of the Act imposes any obligations on BOCs that use, disclose, or permit access to CPNI pursuant to a teaming arrangement. As noted above, however, the CPNI requirements the Commission previously established

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[386] We note that under section 274(c)(2)(B) a BOC may not "own" a teaming arrangement, i.e., have a direct or indirect equity interest (or the equivalent thereof) of more than 10 percent of an entity, or the right to more than 10 percent of the gross revenues of an entity under a revenue sharing or royalty agreement. See 47 U.S.C. § 274(i)(8).

[387] See 47 U.S.C. § 274(i)(3).

in the Computer II and Computer II proceedings remain in effect, pending the outcome of the CPNI proceeding, to the extent that they do not conflict with section 222 of the Act. Because we conclude that "basic telephone [5433] service information" under section 274(i)(3) includes network information, BOCs that provide network information as part of a teaming arrangement are required to provide such information to other teaming arrangements on a nondiscriminatory basis pursuant to section 274(c)(2)(B).

c. Electronic Publishing Joint Ventures -- Section 274(c)(2)(C)

1) Permissible Level of BOC Ownership Interest in Electronic Publishing Joint Venture and Waiver for "Good Cause"

a) Background

170. Section 274(c)(2)(C) of the Act expressly permits a BOC or affiliate to "participate on a nonexclusive basis in electronic publishing joint ventures with entities that are not a [BOC], affiliate, or separated affiliate to provide electronic publishing services."[388] The BOC or affiliate, however, may not hold more than a 50 percent direct or indirect equity interest (or the equivalent thereof) or the right to more than 50 percent of the voting control over the joint venture.[389] In addition, officers and employees of a BOC or affiliate participating in an electronic publishing joint venture may hold no greater than 50 percent of the voting control over the joint venture.[390] The House Report clarifies that this restriction prohibits officers and employees of

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[388] 47 U.S.C. § 274(c)(2)(C).

[389] Id.

[390] Id.

a BOC from "collectively having more than 50 percent of the voting control of the venture."[391] In the Notice, we tentatively concluded that a BOC is deemed to "own" an electronic publishing joint venture "if it holds greater than a 10 percent but not more than a 50 percent direct or indirect equity interest in the venture, or has the right to greater than 10 percent but not more than 50 percent of the venture's gross revenues."[392] We sought comment on that tentative conclusion.[393]

171. Section 274(c)(2)(C) also provides that, "in the case of joint ventures with small, local electronic publishers, the Commission for good cause shown may authorize [a BOC] or affiliate to have a larger equity interest, revenue share, or voting control but not to [5434] exceed 80 percent."[394] As we observed in the Notice, although the term "small, local electronic publisher" is not defined in the statute, the House Report indicates that the term was intended to apply to publishers serving communities of fewer than 50,000 persons.[395] We sought comment in the Notice on how we should determine the service area of a "small, local electronic publisher" for the purpose of applying the 80 percent threshold.[396] In addition, we sought comment on whether it would be consistent with congressional intent to adopt additional standards for determining which electronic publishers are subject to the 80 percent threshold, and,

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[391] House Report at 86 (emphasis added). As noted above, the Conference Committee adopted the House provisions, with some modifications. Joint Explanatory Statement at 156.

[392] Notice at ¶ 59.

[393] Id.

[394] 47 U.S.C. § 274(c)(2)(C).

[395] Notice at ¶ 60.

[396] Id. at ¶ 61.

if so, what such standards should be.[397] We also sought comment on how we should define "local" under section 274(c)(2)(C).[398]

172. With regard to section 274(c)(2)(C)'s provision allowing waiver of the 50 percent equity interest and revenue share limitation in the case of joint ventures with small, local electronic publishers for "good cause shown," we sought comment on the "good cause" showing that is required under that provision, and whether any additional regulations are necessary to implement the provision.[399]

b) Comments

173. The Joint Parties agree that a minimum 10 percent equity interest or gross revenue share by a BOC is sufficient to constitute ownership of an electronic publishing joint venture.[400] NAA states that a BOC must "own" an electronic publishing joint venture, which means it must hold greater than a 10 percent direct or indirect equity interest in the venture, or have the right to greater than 10 percent of the venture's gross revenues.[401] NAA also points out that, except for joint ventures with small, local electronic publishers, a BOC is limited to a minority stake in the electronic publishing joint venture.[402] NAA argues that we should not adopt any standards at this time for determining what constitutes a "small, local electronic publisher" under section 274(c)(2)(C), but instead should address the issue in the [5435]

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[397] Id.

[398] Id.

[399] Id. at ¶ 62.

[400] Joint Parties at 3.

[401] NAA at 8.

[402] Id.

context of specific waiver applications.[403] NAA maintains that, in such cases, the "good cause" showing that is required under section 274(c)(2)(C) would be satisfied by demonstrating that greater participation by the BOC "is needed to enable the [electronic publishing] service to be provided to the public."[404]

c) Discussion

174. We conclude that a BOC may hold greater than a 10 percent but not more than a 50 percent direct or indirect equity interest in an electronic publishing joint venture under section 274(c)(2)(C) of the Act, or may have the right to greater than 10 percent but not more than 50 percent of the venture's gross revenues. Therefore, while a BOC may "own" an electronic publishing joint venture, it is limited to a 50 percent stake in such venture. Our interpretation is consistent with the definition of "electronic publishing joint venture" in section 274(i)(5) of the Act, which contemplates a degree of ownership by a BOC or affiliate,[405] the definition of "own" in section 274(i)(8), and with the plain language of section 274(c)(2)(C), which restricts a BOC's ownership or revenue share interest in an electronic publishing joint venture to 50 percent.

175. We decline at this time to adopt any standards for determining which entities constitute "small, local electronic publishers" for the purpose of applying the 80 percent threshold in section 274(c)(2)(C) of the Act. While the House Report indicates that the term was intended to apply to publishers serving communities of fewer than 50,000 persons, it is difficult from a practical standpoint to define the service area of such publishers, given that electronic publishing services, by

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[403] Id. at 9.

[404] Id.

[405] See 47 U.S.C. § 274(i)(5).

definition, contemplate the dissemination of information to the general public. Moreover, the term "small" may be defined based on a variety of standards, including the size of the community served, the gross revenues of the electronic publishing entity, or other factors. Given the difficulties with establishing standards at this time for determining what constitutes a "small, local electronic publisher" under section 274(c)(2)(C), we conclude that it is best to clarify this phrase on a case-by-case basis.

176. With regard to the "good cause" showing that is required for a BOC to hold a greater interest in an electronic publishing joint venture with a small, local electronic publisher under section 274(c)(2)(C) of the Act, one factor we may consider in determining whether a BOC has satisfied this standard is whether increased investment by the BOC is necessary to enable the joint venture to provide electronic publishing services. In adopting section 274(c)(2)(C), we believe that Congress intended, inter alia, to encourage market participation by small, local electronic publishing entities in the provision of electronic publishing services by allowing a BOC to hold a greater ownership interest in electronic [5436] publishing joint ventures with such entities. We emphasize, however, that this is only one factor we may consider in determining whether a BOC satisfies the "good cause" standard under section 274(c)(2)(C), and that other circumstances may exist that militate for or against a finding of "good cause." We thus conclude that the issue of what constitutes "good cause" under section 274(c)(2)(C) should be addressed on a case-by-case basis in the context of fact-specific waiver applications.

2) BOC Participation on a "Nonexclusive" Basis

a) Background

177. In the Notice, we also sought comment on what regulations, if any, are necessary to ensure that a BOC

participates in an electronic publishing joint venture on a "nonexclusive" basis.[406] We noted that this provision appears to prohibit arrangements whereby a BOC participates in an electronic publishing joint venture with an electronic publishing entity to the exclusion of all other such entities.[407] We also sought comment on whether the provision prohibits contracts between a BOC and an electronic publisher whereby the electronic publisher is committed to purchase basic transmission services necessary to provide electronic publishing exclusively from such BOC, or whether the provision contemplates other types of prohibitions.[408]

b) Comments

178. BellSouth, NAA, and NYNEX argue that the "nonexclusive" requirement in section 274(c)(2)(C) precludes a BOC from entering into an electronic publishing joint venture with one entity to the exclusion of all others.[409] PacTel similarly states that a BOC and its affiliate are prohibited under the provision from entering into an agreement that either prohibits other parties from participating in the joint venture or precludes the BOC or its affiliate from participating in other electronic publishing joint ventures with other parties.[410] BellSouth states, however, that a BOC is not obligated to participate in more than one electronic publishing joint venture.[411] BellSouth and NAA also argue that the provision does not preclude a BOC from insisting, as a condition of its participation in the electronic

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[406] Notice at ¶ 63.

[407] Id.

[408] Id.

[409] BellSouth at 20; NAA at 9; NYNEX Reply at 11.

[410] PacTel at 19-20.

[411] BellSouth at 20.

[5437] publishing joint venture, that the joint venture purchase basic transmission services exclusively from the BOC in order to provide electronic publishing services.[412] NAA and PacTel contend that the provision does not require an electronic publishing joint venture to be open to all, nor does it prelude a BOC from exercising its business judgment regarding its joint venture partners.[413]

c) Discussion

179. We conclude that the section 274(c)(2)(C) requirement that a BOC or affiliate participate in an electronic publishing joint venture on a "nonexclusive" basis prohibits a BOC or affiliate from entering into an agreement with its joint venture partner that precludes either entity from participating in other such ventures with other parties. The "nonexclusive" requirement in section 274(c)(2)(C) protects against the potential that a BOC could place competing local exchange providers at a competitive disadvantage by preventing its joint venture partners from aligning with such providers in other electronic publishing joint ventures. We note, however, that while section 274(c)(2)(C) of the Act proscribes these types of exclusive arrangements, it does not prevent a BOC from agreeing with its joint venture partner to exclude other parties from that particular venture. In addition, we find that section 274(c)(2)(C) does not require that an electronic publishing joint venture be open to any and all potential venture participants, nor does it preclude a BOC from exercising its business judgment regarding its joint venture partners. As noted above, because an "electronic publishing joint venture" as defined in section 274(i)(5) of the Act, contemplates some degree of BOC ownership, a BOC should be allowed to retain discretion regarding its joint venture partners. Requiring

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[412] BellSouth at 21; NAA at 9.

[413] NAA at 9; PacTel at 19-20; see also NYNEX Reply at 11.

a BOC to take an ownership interest in a joint venture in which it was not free to select its partner would discourage BOCs from participating in such ventures and restrict competition in the provision of electronic publishing services.[414]

180. We also find that the "nonexclusive" requirement in section 274(c)(2)(C) of the Act does not require a BOC or BOC affiliate to participate in more than one electronic publishing joint venture. As BellSouth points out, such an interpretation could be viewed as precluding a BOC from consummating an electronic publishing joint venture arrangement with its joint venture partner until the BOC had located and negotiated with another partner with whom to establish a joint venture.[415] A BOC thus may refuse to participate in a second electronic publishing joint venture that is proposed to it after it has entered into an electronic publishing joint venture with another unaffiliated entity. Given that Congress, in adopting section 274 of the Act, sought to promote competition in the provision of electronic [5438] publishing services by allowing BOCs to provide such services subject to certain safeguards, we conclude that section 274(c)(2)(C) was not intended to require a BOC to participate in more than one electronic publishing joint venture. Such a requirement could restrict competitive entry into the provision of electronic publishing services by hampering BOC participation in electronic publishing joint ventures.

181. We also conclude that section 274(c)(2)(C) does not preclude a BOC from requiring an electronic publishing joint venture to purchase basic transmission services exclusively from the BOC as a condition of the BOC's participation in the joint venture. The express language of section 274(a) of the Act

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[414] See, e.g., discussion of "nondiscriminatory" in the context of teaming arrangements supra at ¶ 168.

[415] BellSouth at 20.

contemplates the provision by an electronic publishing joint venture of electronic publishing services that are disseminated by means of the BOC or BOC affiliate's basic telephone service. Moreover, nothing in section 274(a) indicates that Congress intended to prohibit a BOC participating in an electronic publishing joint venture from requiring that the joint venture purchase basic telephone service exclusively from the BOC.

3) Interplay Between Section 274(c)(1)(B) and Section 274(c)(2)(C)

a) Background

182. We noted in the Notice that the joint marketing prohibitions in section 274(c)(1) of the Act appear not to apply to an electronic publishing joint venture.[416] We also sought comment on the extent to which section 274(c)(2)(C), which allows a BOC to participate in electronic publishing joint ventures under certain conditions, permits a BOC to market jointly with an electronic publishing joint venture in light of other provisions in section 274 that prohibit certain marketing activities.[417] We noted, for example, that section 274(b)(6) prohibits an electronic publishing joint venture from using the "name, trademark, or service marks of an existing [BOC]" for the marketing of any product or service, while section 274(c)(2)(A) permits a BOC to provide inbound telemarketing services for, among other things, an electronic publishing joint venture, but only under certain conditions.[418] In addition, we sought comment in the Notice on the distinction, if any, between the term "carry out" in sections 274(c)(1)(A) and (B), which set forth the general marketing prohibitions on BOCs, and the term "provide" in

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[416] Notice at ¶ 51.

[417] Id. at ¶ 52.

[418] Id.

section 274(c)(2)(C).[419]

[5439] b) Comments

183. A number of commenters argue that section 274(c)(2)(C) is an exception to the general joint marketing prohibitions in section 274(c)(1) of the Act and thus permits a BOC to provide promotion, marketing, sales and advertising services to an electronic publishing joint venture.[420] SBC argues that, because section 274(c)(2)(C) authorizes a BOC participating in an electronic publishing joint venture to "provide promotion, marketing, sales, or advertising personnel and services," the venture itself may be staffed by BOC marketing and sales personnel.[421] Ameritech argues that joint marketing activities otherwise prohibited under section 274(c)(1) are permitted to the extent they come under one of the three categories of permissible joint marketing activities in section 274(c)(2) of the Act.[422] NAA argues that section 274(c)(2)(C) permits a BOC to market jointly with an electronic publishing joint venture subject to the restrictions in section 274(b)(6) on use of names and trademarks.[423] In addition, NAA contends that the use of the terms "carry out" in section 274(c)(1) and "provide" in section 274(c)(2)(C) was not intended to limit the services a BOC may perform for an electronic publishing joint venture.[424]

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[419] Id. at ¶ 53.

[420] Bell Atlantic at 7; BellSouth at 17; Joint Parties at 2; SBC at 12-13; USTA at 5.

[421] SBC at 14.

[422] Ameritech at 17.

[423] NAA at 6.

[424] Id. at 7.

184. Conversely, Time Warner argues that a BOC is prohibited from jointly marketing its local exchange services with the electronic publishing services of an electronic publishing joint venture, and vice versa.[425] According to Time Warner, if a joint venture were permitted to jointly market its electronic publishing services with the BOC's local exchange services, "the ability to leverage the BOC's local exchange monopoly into the electronic publishing market would remain."[426]

185. Bell Atlantic contends that sections 274(b)(6) and (c)(2)(A) of the Act do not affect the right of a BOC to provide marketing services for an electronic publishing joint venture.[427] According to Bell Atlantic, the statute prohibits the joint venture, not the BOC, [5440] from using the BOC's name, trademark or service marks.[428] To the extent the BOC is providing services to the joint venture, Bell Atlantic argues, it is free to use its own name, trademark and service marks.[429] Bell Atlantic also maintains that it is subject to the conditions on inbound telemarketing in section 274(c)(2)(A) of the Act to the extent it performs inbound telemarketing activities for a joint venture.[430]

c) Discussion

186. We conclude that section 274(c)(2)(C) provides an exception to the general joint marketing prohibitions imposed on BOCs in section 274(c)(1) of the Act. As some commenters point out, the introductory clause in section 274(c)(1) of the Act

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[425] Time Warner at 25-26.

[426] Id. at 26.

[427] Bell Atlantic at 8-9.

[428] Id. at 9.

[429] Id.

[430] Id.

indicates that subsections (c)(1)(A) and (B) prohibit BOCs from carrying out certain types of joint marketing activities "except as provided in [section 274(c)(2)]."[431] Therefore, while section 274(c)(1)(B) of the Act might otherwise be interpreted to prohibit a BOC from carrying out joint marketing activities with an electronic publishing joint venture, section 274(c)(2)(C) provides a clear exception that allows a BOC to engage in such activities. In particular, section 274(c)(2)(C) of the Act expressly permits a BOC participating in an electronic publishing joint venture to provide "promotion, marketing, sales or advertising personnel and services" to such joint venture.[432]

187. Given the plain language of section 274(c)(2)(C), which allows a BOC participating in an electronic publishing joint venture to provide "promotion, marketing, sales or advertising personnel and services" to such joint venture,[433] we agree with SBC that an electronic publishing joint venture may be staffed by BOC marketing and sales personnel. Moreover, we agree with NAA that use of the terms "carry out" in section 274(c)(1) and "provide" in section 274(c)(2)(C) was not intended to limit the services a BOC may perform for an electronic publishing joint venture. To the contrary, based on the more specific language of the statute, which allows BOC provision of marketing personnel as well as services, we conclude that section 274(c)(2)(C) contemplates a broader range of BOC marketing activities than those proscribed in section 274(c)(1) of the Act.

[5441] 188. We also conclude that section 274(c)(2)(C) does not override the general prohibition in section 274(b)(6) of the Act on the use of "name, trademarks, or service marks of an existing [BOC]" by an electronic publishing joint venture and a

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[431] 47 U.S.C. § 274(c)(1).

[432] Id. § 274(c)(2)(C).

[433] Id. (emphasis added).

BOC for the marketing of any product or service of the joint venture. Nothing in section 274 of the Act indicates that Congress intended section 274(c)(2)(C) to provide an exception to the broad restriction in section 274(b)(6) on the use of an existing BOC's name, trademarks and service marks. As such, to the extent a BOC engages in marketing activities permissible under section 274(c)(2)(C) of the Act, it must still comply with section 274(b)(6), as well as all other applicable provisions in section 274. For example, we agree with Bell Atlantic that a BOC is subject to the conditions in section 274(c)(2)(A) of the Act to the extent it performs inbound telemarketing activities for an electronic publishing joint venture.

D. Nondiscrimination Safeguards

1. Background

189. Section 274(d) requires a BOC "under common ownership or control with a separated affiliate or electronic publishing joint venture [to] provide network access and interconnections for basic telephone service to electronic publishers at just and reasonable rates that are tariffed (so long as rates for such services are subject to regulation) and that are not higher on a per-unit basis than those charged for such services to any other electronic publisher or any separated affiliate engaged in electronic publishing."[434] Prior to the Act, electronic publishing services were regulated as enhanced services and were subject to the nondiscrimination requirements established under the Commission's Computer II[435] and

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[434] Id. § 274(d).

[435] Amendment of Section 64.702 of the Commission's Rules and Regulations ("Computer II"), 77 FCC 2d 384 (1980) ("Final Order"), recon., 84 FCC 2d 50 (1981), aff'd sub nom. Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983).

Computer III regimes.[436] Under Computer III and Open Network Architecture,[437] BOCs have [5442] been permitted to provide enhanced services on an integrated basis. Moreover, BOCs have been required to provide at tariffed rates nondiscriminatory interconnection to unbundled network elements used to provide enhanced services.[438]

190. We concluded in the Notice that the Computer III/ONA requirements should continue to apply to the extent that such requirements are not inconsistent with the Act.[439] We sought comment on whether the requirements of Computer III/ONA are consistent with the nondiscrimination requirements of section

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[436] Amendment of Section 64.702 of the Commission's Rules and Regulations ("Computer II"), CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986) ("Phase I Order"), recon., 2 FCC Rcd 3035 (1987) ("Phase I Reconsideration Order"), further recon., 3 FCC Rcd 1135 (1988) ("Phase I Further Reconsideration Order'), second further recon., 4 FCC Rcd 5927 (1989) ("Phase I Second Further Reconsideration Order"); Phase II, 2 FCC Rcd 3072 (1987) ("Computer III Phase II Order'), recon., 3 FCC Rcd 1150 (1988) ("Phase II Reconsideration Order"), further recon., 4 FCC Rcd 5927 (1989) ("Phase II Further Reconsideration Order"); Computer III Remand Proceeding, 5 FCC Rcd 7719 (1990) ("ONA Remand Order"), recon., 7 FCC Rcd 909 (1992); Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards, 6 FCC Rcd 7571 (1991) ("BOC Safeguards Order").

[437] See Filing and Review of Open Network Architecture Plans, 4 FCC Rcd 1 (1988) ("BOC ONA Order"), recon., 5 FCC Rcd 3084 (1990) ("BOC ONA Reconsideration Order"); 5 FCC Rcd 3103 (1990) ("BOC ONA Amendment Order"), erratum, 5 FCC Rcd 4045, pets. for review denied, California v. FCC, 4 F.3d 1505 (9th Cir. 1993), recon., 8 FCC Rcd 97 (1993) ("BOC ONA Amendment Reconsideration Order"); 6 FCC Rcd 7646 (1991) ("BOC ONA Further Amendment Order"); 8 FCC Rcd 2606 (1993) ("BOC ONA Second Further Amendment Order"), pet. for review denied, California v. FCC, 4 F.3d 1505 (9th Cir. 1993) (collectively referred to as the ONA Proceeding).

[438] See Computer III, 104 FCC 2d 958.

[439] Notice at ¶ 65.

274(d).[440] To the extent that commenters argue that the Computer III/ONA requirements are inconsistent, we sought comment on whether and to what extent regulations are necessary to implement section 274(d).[441]

191. We also tentatively concluded in the Notice that section 274(d) prohibits BOCs under common ownership or control with a separated affiliate or electronic publishing joint venture from providing volume discounts, term discounts, or other preferential rates for basic telephone service to electronic publishers.[442] In reaching this tentative conclusion, we reasoned that any such discount would be unlawful because section 274(d) prohibits BOCs from providing basic telephone services to some electronic publishers at rates that are "higher on a per-unit basis" than rates charged to other electronic publishers.[443] We also tentatively concluded that section 274(d) does not require BOCs to file tariffs for services that no longer are subject to tariff regulation.[444] Finally, we sought comment on the meaning of the requirement that access and interconnection be provided to electronic publishers "at just and reasonable rates that are tariffed (so long as rates for such services are subject to regulation)."[445]

[5443] 2. Comments

192. The parties generally agree that the language of section 274(d) is sufficiently clear and that there is no need for the Commission to adopt additional rules to implement this

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[440] Id.

[441] Id. at ¶¶ 64-65.

[442] Id. at ¶ 67.

[443] Id. 47 U.S.C. § 274(d).

[444] Notice at ¶ 67.

[445] Id.; 47 U.S.C. § 274(d).

provision of the statute.[446] If the Commission nonetheless adopts rules to implement section 274(d), Cincinnati Bell would exempt "any LEC with less than 2% of the nation's access lines."[447] MCI contends that the BOCs, in complying with section 274(d), must provide competitors with "functional equality or service of equal quality relative to the services the BOCs provide their affiliates."[448]

193. In addition, the commenters generally agree that the Computer III/ONA nondiscrimination requirements are consistent with section 274(d),[449] but they disagree on whether we should continue to apply these requirements to BOC intraLATA electronic publishing services.[450] Some of the BOCs argue that application of the Computer III/ONA requirements is unnecessary because section 274 imposes a separate affiliate requirement on BOCs that is similar to the structural separation requirements of Computer II.[451] Ameritech supports elimination of the Computer III/ONA requirements, claiming that they "were,

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[446] Bell Atlantic at 11; BellSouth at 21; Cincinnati Bell at 2-3; NYNEX at 24; NYNEX Reply at 15-16; PacTel at 20-21; PacTel Reply at 16; SBC at 17; USTA at 5-6; YPPA at 10; YPPA Reply at 9.

[447] Cincinnati Bell at 6.

[448] MCI at 7.

[449] See, e.g., MCI at 6-7; PacTel at 20.

[450] See, e.g., Ameritech Reply at 18-19; AT&T at 21-22; AT&T Reply at 21-22; BellSouth at 21; BellSouth Reply at 17; MCI at 6-7; MCI Reply at 7-8; NYNEX at 24; NYNEX Reply at 16-17; PacTel at 20-21; PacTel Reply at 14-15; Time Warner at 22. We note that the Computer III/ONA requirements do not distinguish between interLATA and intraLATA information services; however, prior to the Act the BOCs effectively were precluded from providing information services on an interLATA basis pursuant to the MFJ. See Notice at ¶ 4.

[451] BellSouth Reply at 17; NYNEX at 24; NYNEX Reply at 16-17; PacTel at 20-21; PacTel Reply at 14-15.

and are, simply a solution in search of a problem."[452] Other commenters, in contrast, support retaining the Computer III/ONA requirements.[453] Time Warner argues that, although the Computer III/ONA requirements "have not been useful to enhanced service providers," these requirements will be more effective if combined with the structural separation and [5444] nondiscrimination requirements of section 274.[454] MCI and AT&T observe that there is no evidence that Congress intended to displace the Computer III/ONA requirements for electronic publishing services, although MCI states that the requirements are "inadequate to prevent discrimination."[455]

194. With regard to preferential rates, AT&T and Time Warner agree with our tentative conclusion that section 274(d) prohibits BOCs under common ownership or control with a separated affiliate or electronic publishing joint venture from providing volume and term discounts for network access and interconnections for basic telephone service to electronic publishers.[456] They contend that, because the rates charged to one electronic publisher must not be higher on a "per-unit basis" than the rates charged to other electronic publishers, the statute requires uniform rates for such services.[457] A number of BOCs, on the other hand, argue that volume and term discounts are permitted so long as the BOC offers the same discount to other electronic publishers on the same terms and conditions.[458]

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[452] Ameritech Reply at 18-19.

[453] AT&T at 21-22; AT&T Reply at 21-22; BellSouth at 21; MCI at 6-7; MCI Reply at 7-8; Time Warner at 22.

[454] Time Warner at 22.

[455] AT&T at 22; AT&T Reply at 21: MCI Reply at 7.

[456] AT&T Reply at 20-21: Time Warner at 21-22.

[457] Id.

[458] Bell Atlantic at 11; NYNEX Reply at 18.; PacTel at 22; USTA at 6.

195. PacTel also argues that Congress did not define the term "units" for purposes of calculating per-unit rates.[459] PacTel notes that it provides transport in units such as DSO, DS1, and DS3,[460] which are priced differently based on its cost savings.[461] PacTel further asserts that a group of minutes of use, when sold together as a block, could constitute a unit, which presumably would cost less than buying the minutes of use individually.[462] It thus asserts that BOCs may continue to create reasonable units or groups of services, and must only offer such units to all electronic publishers at the same price.[463]

[5445] 196. Time Warner also argues that the requirement that rates be just and reasonable and nondiscriminatory should apply independently of any decision to reduce or eliminate tariff filing requirements.[464] In order to enforce this requirement in the event of detariffing, Time Warner contends that the Commission should require BOCs to file with the Commission, and furnish to any electronic publisher upon request, a list of rates charged to electronic publishers.[465] Several BOCs, on the other hand, argue that filing a rate list is unnecessary because, under section 274(b)(3)(B), if a particular service is not subject to tariffing requirements, the transaction must be reduced to writing and

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[459] PacTel at 22.

[460] DSO, DS1 and DS3 refer to transmission facilities with varying degrees of capacity. A DSO link is a 64 kbps channel. A DS1 link has 24 times the carrying capacity of a DSO link. A DS3 link has 28 times the capacity of a DS1 link.

[461] PacTel at 22.

[462] Id.

[463] Id.

[464] Time Warner at 22.

[465] Id.

made publicly available.[466] Moreover, some commenters note that, since section 274(d) does not require BOCs to file tariffs for services that are no longer subject to tariff filing requirements, a separate rate list requirement would be both inconsistent with the statute and overly regulatory.[467]

197. PacTel and YPPA further argue that, once the rates for basic telephone service are no longer subject to regulation, section 274(d) is no longer applicable.[468] These commenters contend that the Commission detariffs services when it determines that competition will keep rates just and reasonable, and therefore that the market, rather than tariff filings or other regulatory requirements, will ensure that rates are just and reasonable.[469]

3. Discussion

198. We decline to adopt rules to implement section 274(d), based on the record before us; we will reconsider this decision if circumstances warrant. We find that the language of section 274(d) is sufficiently clear to ensure that BOCs provide unaffiliated electronic publishers with network access and interconnections for basic telephone service that are equal in quality, and at nondiscriminatory terms, relative to those it provides to electronic publishers affiliated with the BOC. We reject MCI's contention, however, that section 274(d) is a guarantee of functional equivalence for unaffiliated electronic publishers.[470] We find that neither the statute nor its legislative

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[466] Bell Atlantic at 12; NYNEX Reply at 18; PacTel Reply at 16.

[467] PacTel at 21; PacTel Reply at 16; USTA at 6.

[468] PacTel Reply at 16; YPPA at 10.

[469] Id.

[470] MCI at 7.

history supports such an interpretation.

[5446] 199. We also conclude that the Computer III/ONA requirements are consistent with the requirements of section 274(d).[471] The parties have not indicated that there is any inconsistency between the nondiscrimination requirements of Computer III/ONA and section 274(d). Section 274(d), moreover, does not repeal or otherwise affect the Computer III/ONA requirements.

200. We recognize, however, that section 274(b) imposes certain structural separation requirements on BOC provision of electronic publishing services. Under our current regulatory regime, a BOC must comply fully with the Computer II separate subsidiary requirements in providing an information service to be relieved of the obligation to file a Comparably Efficient Interconnection (CEI) plan to provide that service on an integrated basis pursuant to Computer III. The record in this proceeding, however, is insufficient to support a finding, as NYNEX proposes,[472] that BOC electronic publishing services that are offered through a section 274 separated affiliate satisfy all the relevant requirements of Computer II. Instead, we will consider this issue, as well as issues raised regarding the revision or elimination of the Computer III/ONA requirements,[473] in the context of the Computer III Further Remand proceeding.[474] We conclude, therefore, that Computer II, Computer III, and ONA requirements continue to govern the BOCs' provision of

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[471] See, e.g., MCI at 6-7; PacTel at 20.

[472] See NYNEX at 24.

[473] See, e.g., Ameritech Reply at 18-19; BellSouth Reply at 17; NYNEX at 24; NYNEX Reply at 16-17; PacTel at 20-21; PacTel Reply at 14-15.

[474] Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, Notice of Proposed Rulemaking. 10 FCC Rcd 8360 (1995) ("Computer III Further Remand").

intraLATA electronic publishing services. We also note that the nondiscrimination requirements of section 274(d) apply to the BOCs' provision of both intraLATA and interLATA electronic publishing services.

201. We further conclude that section 274(d) prohibits preferential rates, including volume or term discounts. This section expressly requires that a BOC under common ownership or control with a separated affiliate or electronic publishing joint venture must provide other electronic publishers network access and interconnections for basic telephone service at rates "that are not higher on a per-unit basis than those charged for such services" to its own affiliates or other competing electronic publishers.[475] We conclude from the plain language of the statute that Congress intended that BOCs under common ownership or control [5447] with a separated affiliate or electronic publishing joint venture must charge electronic publishers a uniform per-unit rate for a service.[476]

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[475] 47 U.S.C. § 274(d).

[476] We find further support for this interpretation in a floor statement that Congressman Hyde made regarding the purpose of the amendment that contained the "not higher on a per-unit basis" language:

> In the development of the manager's amendment to be offered by Chairman Bliley, the Judiciary Committee has worked closely with the Commerce Committee to improve H.R. 1555 in areas that are of particular concern to, and under the jurisdiction of the Judiciary Committee. . . Under the manager's amendment, the Bell companies will be required to provide services to small electronic publishers at the same per-unit prices that they give to larger publishers. This will allow the small newspapers and other electronic publishers to bring the information superhighway to rural areas that might otherwise be passed by.

141 Cong. Rec. H8292-93 (daily ed. Aug. 2, 1995) (statement of Rep. Hyde,

202. We conclude, however, that section 274(d) only prohibits discounts for network access and interconnections for basic telephone service used in the provision of electronic publishing services. Thus, under qthis section, BOCs may offer discounts for the provision of such services to an electronic publisher for use in any of its other non-electronic publishing activities. Otherwise, an entity that engages in electronic publishing as well as other activities would be prohibited from obtaining a volume discount or term discount for any basic telephone service it purchases for any of its activities, whether or not related to its electronic publishing services. There is no indication that Congress intended to prohibit such discounts for an electronic publisher's non-electronic publishing activities, thereby putting such electronic publisher at a competitive disadvantage vis-a-vis its non-electronic publishing competitors.

203. Moreover, we find that section 274(d) does not require a BOC under common ownership or control with a separated affiliate or electronic publishing joint venture to charge electronic publishers the same per-unit price for different services, particularly when those services use different facilities and impose different costs on the BOCs. Ignoring such cost disparities for providing different services would remove the incentive to use the most efficient service and could increase costs for all electronic publishers as well as hamper competition in the electronic publishing market.

204. We agree with PacTel that the statute does not define the term "units," for purposes of calculating per-unit rates.[477] BOCs. therefore, may charge a flat rate or, in the alternative, a rate based on usage for a service, each of which would have a different base

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Chairman of the House Committee on the Judiciary) (emphasis added).

[477] PacTel at 22.

[5448] unit.[478] We reject, however, PacTel's argument that a group of minutes of use, for example, could constitute a unit, unless such a group of minutes is both the smallest unit of minutes offered to electronic publishers and accommodates the needs of small electronic publishers. In this manner, such a group of minutes would neither constitute a volume discount nor disadvantage small electronic publishers.

205. We also adopt our tentative conclusion that section 274(d) does not require BOCs to file tariffs for services that are not subject to rate regulation. Section 274(d) is clear that BOCs subject to the requirements in this section file tariffs for services only "so long as rates for such services are subject to regulation."[479] No commenter disagrees with this conclusion.

206. In addition, we reject the argument that, because competition will be sufficient to ensure that a detariffed service's rates are just and reasonable, section 274(d) is inapplicable to such services. We find that the "just and reasonable" and "per-unit" requirements in section 274(d) are independent of the requirement that rates be tariffed "so long as rates for such services are subject to regulation."[480] Thus, the section 274(d) nondiscrimination requirements will continue to apply, regardless of whether the service is tariffed or no longer subject to regulation, until the sunset date of this provision in February, 2000.

207. We decline at this time to address Time Warner's argument that the Commission should require BOCs to file rates

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[478] A service sold at a flat rate could be charged, for example, on a per-month basis regardless of actual usage, while a rate based on usage could be sold on a per-minute basis.

[479] 47 U.S.C. § 274(d).

[480] Id.

for network access and interconnections for basic telephone service provided to electronic publishers even after elimination of tariff filing requirements. We note that BOCs currently are required to file state and federal tariffs for ONA services, which are the tariffed services generally used by enhanced service providers, such as electronic publishers, to provide their services to customers.[481] The Commission will determine whether additional filing or regulatory requirements are necessary if and when a service that is currently subject to tariff filing requirements is detariffed. Further, several BOCs stated that section 274(b)(3)(B) eliminates the need for additional regulatory requirements because under that section, if a particular service is not subject to tariffing requirements, the transaction between a BOC and its separated affiliate or joint venture must [5449] be pursuant to a written contract that is publicly available.[482] As discussed below, we are issuing a Further Notice in this proceeding to seek additional comments on the meaning of section 274(b)(3)(B).[483]

IV. TELEMESSAGING

A. Application of Sections 260 and 272 to BOC InterLATA Telemessaging Services

1. Background

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[481] See BOC ONA Amendment Order, 5 FCC Rcd at 3105, ¶ 13 (1990); BOC Safeguards Order, 6 FCC Rcd at 7624 n.212; BOC ONA Order, 4 FCC Rcd at 116-71, ¶¶ 224-325.

[482] Bell Atlantic at 12; NYNEX Reply at 18; PacTel Reply at 16; see also 47 U.S.C. § 274(b)(3)(B) (providing that a BOC and its separated affiliate or electronic publishing joint venture must carry out transactions "pursuant to written contracts or tariffs that are filed with the Commission and made publicly available").

[483] See infra part VII.B.

208. We stated in our Notice that section 260 sets forth various requirements for the provision of telemessaging service by LECs subject to the requirements of section 251(c), i.e., incumbent LECs.[484] The Commission's current rules permit BOCs to provide telemessaging services on an integrated basis, subject to the Computer III/ONA requirements. Other LECs have been permitted to provide telemessaging services subject only to the requirements of sections 201 and 202, which apply to all common carriers, including the BOCs. The Notice also recognized that section 260 does not distinguish between intraLATA and interLATA provision of telemessaging services.[485] We therefore sought comment on whether section 260 applies to BOC provision of telemessaging services, both on an intraLATA and interLATA basis.[486] We also noted that, in the Non-Accounting Safeguards Notice, we tentatively concluded that telemessaging is an information service subject to the separate affiliate and nondiscrimination requirements of section 272 and, therefore, we tentatively concluded that BOC provision of interLATA telemessaging services is subject to the requirements of section 272 in addition to the requirements of section 260.[487] We sought comment on whether, if we decided not to adopt this tentative conclusion. BOCs providing telemessaging services on either an intraLATA or interLATA basis would be subject only to the requirements of section 260.[488]

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[484] See 47 U.S.C. § 260(a). Our discussion in this Order is limited to sections 260(a)(2) and (c), which concern non-accounting safeguards and definitional issues. We address sections 260(a)(1) and 260(b), which concern accounting safeguards and enforcement issues, respectively, in separate proceedings. See ¶ 2 supra.

[485] Notice at ¶ 75.

[486] Id.

[487] Id.

[488] Id.

[5450] 2. Comments

209. Commenters generally agree that section 260 applies to all incumbent LEC provision of telemessaging, both on an intraLATA and interLATA basis.[489] Commenters disagree, however, on whether BOC provision of interLATA telemessaging services is subject to both sections 272 and 260.[490] MCI, U S WEST, and Voice-Tel state that BOC provision of interLATA services is subject to both sections 272 and 260, because telemessaging service is an "information service" and thus falls within the terms of section 272(a)(2)(C).[491] BellSouth and PacTel agree with this point, but argue that Congress, in enacting a separate provision for telemessaging services, did not intend BOC provision of interLATA telemessaging services to be subject to the requirements of section 272.[492]

3. Discussion

210. We conclude that section 260 applies to all incumbent LEC provision of telemessaging services, both on an intraLATA and interLATA basis. We find that neither the statute nor its legislative history evinces an intent by Congress to distinguish between BOCs and other LECs, or between intraLATA and interLATA services. Moreover, because we concluded in the Commission's Non-Accounting Safeguards Order that telemessaging service is an "information service," BOC provision of telemessaging service on an interLATA basis is subject to the requirements of section 272 in addition to the

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[489] AT&T at 5-6; AT&T Reply at 8; Bell Atlantic at 14; MCI Reply at 12.

[490] Compare MCI at 7; MCI Reply at 11-12; U S WEST Reply at 15-16; and Voice-Tel at 11; with BellSouth at 25-26 and PacTel Reply at 19-20.

[491] MCI at 7-8; MCI Reply at 11-12; U S WEST at 31; U S WEST Reply at 15-16; Voice-Tel at 11.

[492] BellSouth at 25-26; PacTel Reply at 19-20.

requirements of section 260.[493]

B. Definition of "Telemessaging Service"

1. Background

211. Section 260(c) defines "telemessaging service" as "voice mail and voice storage and retrieval services, any live operator services used to record, transcribe, or relay messages (other than telecommunications relay services), and any ancillary services offered in combination with these services."[494] We sought comment in the Notice on whether rules are [5451] necessary to clarify any ambiguities in this definition.[495] We also sought comment on the types of services contemplated by the term "ancillary services."[496]

2. Comments

212. None of the commenters identifies any ambiguities in the definition of "telemessaging service" in section 260(c). Some commenters state generally that the language of section 260 is clear and that no rules are needed to implement this provision.[497] ATSI states that "ancillary services" are "all value-added services in addition to those primary [telemessaging] services, offered by telemessagers to the communications customer."[498] ATSI lists specific examples, but recommends against establishing a

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[493] Non-Accounting Safeguards Order at ¶ 145.

[494] 47 U.S.C. § 260(c).

[495] Notice at ¶ 76.

[496] Id.

[497] Bell Atlantic at 1-2, 14-15; PacTel at 23; SBC at 3; USTA at 6; USTA Reply at 1-2.

[498] ATSI at 6.

comprehensive list of primary or ancillary telemessaging services, since new services are created as technology and consumer demands change.[499]

3. Discussion

213. We conclude that the definition of "telemessaging service" in section 260(c) is sufficiently clear and therefore decline to establish an exclusive list of "telemessaging services" or "ancillary services."[500] We will determine whether any individual service is a "telemessaging service" or "ancillary service" as necessary on a case-by-case basis.

[5452] C. Nondiscrimination Requirements

1. Section 260(a)(2) and Sections 201 and 202

a. Background

214. Section 260(a)(2) provides that an incumbent LEC "shall not prefer or discriminate in favor of its telemessaging service operations in its provision of telecommunications services."[501] We sought comment in the Notice on the extent to which section 260(a)(2) imposes greater obligations on LECs providing telemessaging services than currently exist under sections 201

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[499] See ATSI at 6; see also Voice-Tel at 4.

[500] We note that BellSouth asks us to clarify that live operator services do not fall within the Commission's definition of "enhanced" services, because they do not employ "computer processing applications." See BellSouth at 26. We concluded in the Non-Accounting Safeguards Order that live operator services "are an example of one area in which the 'information service' definition is broader than that of 'enhanced services.'" Non-Accounting Safeguards Order at ¶ 145 n.342.

[501] 47 U.S.C. § 260(a)(2).

and 202 of the Act.[502]

b. Comments

215. Some commenters assert that section 260(a)(2) imposes greater obligations on LECs providing telemessaging services than currently exist under sections 201 and 202 of the Act, based on the broad, unqualified language in section 260(a)(2).[503] Some of the BOCs, however, disagree, asserting that section 260(a)(2) merely duplicates the requirements of sections 201 and 202 for incumbent LEC provision of telemessaging services.[504] Voice-Tel contends that, in complying with section 260(a)(2), "it is not sufficient for the interconnections offered to be comparable if the result is that the competitor is put at any disadvantage."[505]

c. Discussion

216. As noted above, section 260(a)(2) states that an incumbent LEC "shall not prefer or discriminate in favor of its telemessaging service operations in its provision of telecommunications services."[506] Section 202(a), in contrast, prohibits "any unjust or unreasonable discrimination . . ., or . . . any undue or unreasonable preference or advantage" by common carriers providing interstate communications services.[507] Because the section 260(a)(2) nondiscrimination bar, unlike that of

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[502] Notice at ¶ 77.

[503] ATSI at 6-7; ATSI Reply at 3; AT&T at 7-8; AT&T Reply at 6-7, n.14; Voice-Tel at 4-7, 10.

[504] NYNEX Reply at 18-19; PacTel at 23; PacTel Reply at 19; SBC at 22.

[505] Voice-Tel at 6.

[506] 47 U.S.C. § 260(a)(2).

[507] Id. § 202(a).

section 202(a), is not qualified by the terms " [5453] unjust and unreasonable," we conclude that Congress did not intend section 260(a)(2) to be synonymous with the nondiscrimination standard in section 202(a), but intended a more stringent standard. This conclusion is consistent with our interpretation of similar language in sections 251(c)(2) and 272(c)(1).[508] We therefore reject claims that section 260(a)(2) merely duplicates the nondiscrimination bar of section 202(a) for the provision of telemessaging services by incumbent LECs.[509]

217. We also conclude that section 260(a)(2) is not a guarantee of functional equivalence for unaffiliated telemessaging providers, as Voice-Tel contends.[510] We find that neither the statute nor its legislative history supports such an interpretation. We note that the Joint Explanatory Statement states only that section 260(a)(2) prohibits incumbent LECs "from discriminating against nonaffiliated entities with respect to the terms and conditions of any network services they provide to their own telemessaging operations."[511] To the extent that competitors require different telecommunications services than the LEC provides to its own telemessaging operations, we note that other nondiscrimination requirements in the Act and analogous state nondiscrimination laws may apply to such requests.[512] In addition, the Commission's ONA rules require the BOCs and GTE to unbundle network services useful to enhanced

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[508] See, e.g., First Interconnection Order at 15612. ¶ 217; Non-Accounting Safeguards Order at ¶ 197.

[509] See AT&T Reply at 7 n.14.

[510] Voice-Tel at 6.

[511] Joint Explanatory Statement at 138.

[512] See, e.g., 47 U.S.C. § 201(a) (providing that "it shall be the duty of every common carrier engaged in interstate . . . communication . . . . to furnish such communication service upon reasonable request").

service providers.[513]

2. Section 260(a)(2) and Computer III/ONA Requirements

a. Background

218. We concluded in the Notice that the nondiscrimination requirements of Computer III/ONA should continue to apply to the extent they are not inconsistent with section 260(a)(2).[514] We sought comment on whether the nondiscrimination provisions of Computer III/ONA are consistent with section 260(a)(2), and whether these provisions should [5454] be applied only to the BOCs or to all incumbent LECs to fulfill the requirements of section 260(a)(2).[515]

b. Comments

219. Most commenters agree that the Computer III/ONA nondiscrimination requirements are consistent with section 260(a)(2) and assert that these requirements should continue to apply to BOC intraLATA telemessaging services.[516] MCI and AT&T observe that there is no evidence that Congress intended to displace the Computer III/ONA requirements for telemessaging services.[517] Similarly, ATSI asserts that "section 260 is not limited by existing rules or other provisions of the

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[513] See BOC ONA Order at 12, 15-16, 207-08, ¶¶ 4, 14, 397-97; Phase I Order at 1019-20, ¶ 113.

[514] Notice at ¶ 77.

[515] Id.

[516] ATSI at 6-7; ATSI Reply at 4; AT&T at 8-9; AT&T Reply at 7-8; BellSouth at 26; BellSouth Reply at 5-6; MCI at 7-8; MCI Reply at 7-8, 15: PacTel at 23; PacTel Reply at 19-20; but see Bell Atlantic at 14-15; U S WEST at 34; Voice-Tel at 6.

[517] AT&T at 9; MCI Reply at 7; see also ATSI Reply at 4.

Act."[518] The commenters disagree, however, on whether the current scope of the Computer III/ONA requirements should be extended to include all incumbent LECs, not just the BOCs. Cincinnati Bell asserts that the Computer III/ONA requirements should not be extended beyond their current scope,[519] while PacTel and U S WEST argue that they should be extended to include all incumbent LECs.[520] AT&T would extend the Computer III/ONA requirements to all incumbent LECs "possessing substantial market power as a result of [their] bottleneck control over local exchange facilities in a significant service area (e.g., SNET, GTE, and other Tier I LECs),"[521] while USTA would exempt small and mid-sized LECs from these requirements.[522]

220. Several commenters argue that the Computer III/ONA requirements should be revised or eliminated. Although MCI supports continued application of the Computer III/ONA requirements, it states that they "are inadequate to prevent access discrimination."[523] Ameritech supports elimination of the Computer III/ONA requirements, claiming that they " [5455] were, and are, simply a solution in search of a problem."[524] Bell Atlantic argues that the Computer III/ONA rules are unnecessary, given that price caps and sections 202(a) and 251 "fully protect against discrimination."[525]

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[518] ATSI at 6-7.

[519] Cincinnati Bell at 6-7.

[520] PacTel at 23; U S WEST at 34.

[521] AT&T at 9; AT&T Reply at 8-9.

[522] USTA at 6-7.

[523] MCI at 7-8; MCI Reply at 8.

[524] Ameritech Reply at 18-19.

[525] Bell Atlantic at 14-15.

c. Discussion

221. We conclude that the Computer III/ONA requirements are consistent with the requirements of section 260(a)(2). We affirm our conclusion, therefore, that Computer III/ONA requirements continue to govern the BOCs' provision of intraLATA telemessaging services.[526] We also note that the nondiscrimination requirements of section 260(a)(2) apply to the BOCs' provision of both intraLATA and interLATA telemessaging services, as well as other incumbent LECs' provision of telemessaging services. The parties have not indicated that there is any inconsistency between the nondiscrimination requirements of Computer III/ONA and section 260(a)(2). Section 260(a)(2), moreover, does not repeal or otherwise affect the Computer III/ONA requirements. We will consider in the Commission's Computer III Further Remand proceeding whether the Computer III/ONA requirements need to be revised or eliminated. For the same reason, we also decline to extend the Computer III/ONA requirements to entities other than BOCs, as recommended by some commenters.

3. Section 260(a)(2) and Adoption of Rules

a. Background

222. We sought comment in the Notice on whether and what types of specific regulations may be necessary to implement section 260(a)(2).[527]

b. Comments

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[526] In addition, we note that the Commission's Computer II requirements also continue to govern BOC provision of intraLATA information services, including telemessaging.

[527] Notice at ¶ 77.

223. The BOCs argue that the language of section 260(a)(2) is sufficiently clear and thus there is no need for the Commission to adopt rules to implement this provision.[528] ATSI and Voice-Tel, on the other hand, argue that the Commission should adopt rules to implement [5456] section 260(a)(2).[529] Voice-Tel states that Commission rules will ensure that complaints of discrimination are treated consistently and will help the Commission administer the Act efficiently.[530] SBC argues that any rules adopted by the Commission must apply to all incumbent LECs,[531] while Cincinnati Bell would exempt any LEC with less than two percent of the nation's access lines.[532]

224. Voice-Tel argues that the "broad language" of the nondiscrimination requirement in section 260(a)(2) "makes any discrimination in pricing or other behavior unlawful," including the marketing of voice messaging services.[533] Some BOCs, on the other hand, argue that the scope of section 260(a)(2) is limited to the provision of "telecommunications services," which, as defined in section 3(46) of the Act, does not include marketing-related activities.[534]

225. Voice-Tel also would require all incumbent LECs to establish a separate affiliate to provide telemessaging services,

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[528] Bell Atlantic at 15; BellSouth at 26; Cincinnati Bell at 3, 7; PacTel at 23; SBC at 1-3, 22; USTA at 6; U S WEST at 34.

[529] ATSI at 7; ATSI Reply at 4; Voice-Tel at 10-11.

[530] Voice-Tel at 9.

[531] SBC at 22.

[532] Cincinnati Bell at 6.

[533] Voice-Tel at 6.

[534] Bell Atlantic Reply at 11; BellSouth Reply at 6; NYNEX Reply at 19; PacTel Reply at 20; SBC Reply at 23; USTA Reply at 2; U S WEST Reply at 16-17.

in order to ensure that incumbent LECs comply with section 260(a)(2).[535] Voice-Tel claims that nothing in the Act prevents the Commission from imposing this measure.[536] The BOCs argue, in contrast, that, if Congress had intended to establish a separate affiliate requirement, it would have expressly said so, as it did for certain information services in section 272 and for electronic publishing services in section 274.[537]

[5457] c. Discussion

226. We conclude that no rules are necessary to implement section 260(a)(2), based on the record before us; we will reconsider this decision if circumstances warrant. We therefore decline to adopt the specific rules proposed by certain commenters.[538]

227. In particular, we decline to impose a separate affiliate requirement on all incumbent LECs providing telemessaging services. We find that the safeguards expressly established by Congress in section 260 are sufficient to guard against discriminatory behavior by incumbent LECs in favor of their own telemessaging operations. In addition, we find it significant that Congress limited the separate affiliate requirement in section 272 to BOC provision of interLATA information services (including interLATA telemessaging services), interLATA telecommunications services, and manufacturing, and in section 274 to BOC provision of electronic publishing services.

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[535] Voice-Tel at 11-12.

[536] Id.

[537] BellSouth Reply at 5-6; PacTel Reply at 19; SBC Reply at 23-24; USTA Reply at 2-3; U S WEST Reply at 15-16. See Bell Atlantic Reply at 10-12.

[538] ATSI at 7-8; ATSI Reply at 4: Voice-Tel at 10-11.

228. Further, we conclude that the scope of section 260(a)(2) is limited, by its terms, to the provision of "telecommunications services," which, as defined in section 3(46) of the Act, does not include marketing-related activities. Accordingly, we reject Voice-Tel's argument that marketing is included within the scope of 260(a)(2).[539]

V. FINAL REGULATORY FLEXIBILITY CERTIFICATION

229. The Commission certified in the Notice that the conclusions it proposed to adopt would not have a significant economic impact on a substantial number of small entities because the proposed conclusions did not pertain to small entities.[540] No comments were submitted in response to the Commission's request for comment on its certification. For the reasons stated below, we certify that the conclusions adopted herein will not have a significant economic impact on a substantial number of small entities.[541] This certification conforms to the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).[542]

[5458] 230. The RFA provides that the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[543] The Small Business

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[539] Voice-Tel at 6-7, 10-11.

[540] Notice at ¶ 87.

[541] 5 U.S.C. § 605(b).

[542] 5 U.S.C. §§ 601-611. SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 (CWAAA), Pub. L. No. 104-121, 110 Stat. 847 (1996).

[543] 5 U.S.C. § 601(3). The term "small entity" is a generic term encompassing the terms "small business," "small organization," and "small

Act defines a "small business concern" as one that is independently owned and operated; is not dominant in its field of operation; and meets any additional criteria established by the Small Business Administration (SBA).[544] SBA has not developed a definition of "small incumbent LECs." The closest applicable definition under SBA rules is for Standard Industrial Classification (SIC) code 4813 (Telephone Communications, Except Radiotelephone).[545] The SBA has prescribed the size standard for a "small business concern" under SIC code 4813 as 1,500 or fewer employees.[546]

231. The conclusions we adopt in this Order to implement section 274 apply only to the BOCs which, because they are large corporations that are dominant in their field of operation and have more than 1,500 employees, do not fall within the SBA's definition for a "small business concern." The conclusions we adopt pursuant to section 260, however, apply to all incumbent LECs. Some of these incumbent LECs may have fewer than 1,500 employees and thus meet the SBA's size standard to be considered "small." Because such incumbent LECs, however, are either dominant in their field of operations or are not independently owned and operated, consistent with our prior practice, they are excluded from the definition of "small entity" and "small business concerns."[547] Accordingly, our use of the terms "small entities" and "small businesses" does not

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governmental jurisdiction" under the RFA. See 5 U.S.C. § 601(6).

[544] 15 U.S.C. § 632(a)(1).

[545] See Executive Office of the President, Office of Management and Budget, Standard Industrial Classification Manual 282 (1987) (stating that SIC code 4813 includes "establishments primarily engaged in furnishing telephone voice and data communications . . . [or] leasing . . . methods of telephone transmission . . . and reselling . . . to others").

[546] 13 C.F.R. § 121.201.

[547] See First Interconnection Order at 16144-45, 16150, ¶¶ 1328-30, 1342.

encompass small incumbent LECs.[548] Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will consider small incumbent LECs within this analysis and use the term "small incumbent LECs" to refer to any incumbent LECs that arguably might be defined by SBA as "small business concerns."

232. With respect to section 260, the most reliable source of information regarding the number of LECs nationwide of which we are aware appears to be the data that we collect annually in connection with the Telecommunications Relay Service (TRS). According to our most recent data, 1,347 companies reported that they were engaged in the provision of local [5459] exchange services.[549] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,347 small incumbent LECs that may be affected by the conclusions adopted in this Order.

233. The Commission adopts the conclusions in this Order to ensure the prompt implementation of sections 260 and 274 of the Act. Section 260 permits incumbent LECs, including the BOCs, to provide telemessaging service subject to certain nondiscrimination safeguards. We certify that although there may be a substantial number of small incumbent LECs affected by the conclusions adopted in this Order to implement section 260, these conclusions will not have a significant economic impact on those affected small incumbent LECs.

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[548] See id. 16150 ¶ 1342.

[549] Federal Communications Commission, CCB, Industry Analysis Division, Telecommunications Industry Revenue: TRS Fund Worksheet Data, Tbl. 21 (Average Total Telecommunications Revenue Reported by Class of Carrier) (Feb. 1996).

234. We decline to elaborate on the definition of "telemessaging service" prescribed by Congress or to establish a list of services that fall within section 260(c), for the reasons set forth in Part IV.B. Because we take no action pursuant to section 260(c) in this Order, there will be no significant economic impact on a substantial number of small entities.

235. Our conclusion that section 260(a)(2) imposes a more stringent standard for determining whether discrimination is unlawful than that which already exists under sections 201 and 202 and applies to all incumbent LECs[550] will not have a significant economic impact on small incumbent LECs. Incumbent LECs, including small incumbent LECs, are subject to other nondiscrimination requirements in the Act and state law and therefore already are required to respond to complaints of discriminatory behavior or limit their participation in discriminatory activities. We therefore find that the impact on incumbent LECs, including small incumbent LECs, of the more stringent standard
of section 260(a)(2) will most likely be minimal.

236. Our decision not to extend the Computer III/ONA nondiscrimination requirements to all incumbent LECs, as well as our decision not to adopt rules implementing the nondiscrimination requirement of section 260(a)(2), as noted in Section IV.C, will prevent any significant economic impact on incumbent LECs, particularly small incumbent LECs. Thus, although their conduct will be subject to the requirements of section 260, small incumbent LECs will be spared the regulatory burdens and economic impact of complying with additional rules.

[5460] 237. Section 274 of the Act allows BOCs to provide

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[550] See supra ¶¶ 210, 216.

electronic publishing service disseminated by means of its basic telephone service only through a "separated affiliate" or an "electronic publishing joint venture" that meets the separation, joint marketing, and nondiscrimination requirements prescribed by that section. BOCs that were offering electronic publishing services at the time the 1996 Act was enacted have until February 8, 1997, to meet those requirements, which expire on February 8, 2000. Because section 274 applies only to BOCs, which, as noted above, do not fall within the SBA's definition for a "small business concern," the conclusions we adopt in this Order implementing this section have no significant economic impact on a substantial number of small entities.

238. The Commission shall send a copy of this certification, along with this Order, in a report to Congress pursuant to the SBREFA, 5 U.S.C. § 801(a)(1)(A). A copy of this certification will also be provided to the Chief Counsel for Advocacy of the Small Business Administration, and will be published in the Federal Register.

VI. FINAL PAPERWORK REDUCTION ANALYSIS

239. As required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13,[551] the Notice invited the general public and the OMB to comment on proposed changes to the Commission's information collection requirements contained in the Notice.[552] Specifically, the Commission proposed to extend various reporting requirements, which apply to the BOCs under Computer III, to all incumbent LECs pursuant to section 260(a)(2). OMB approved all of the proposed changes to the Commission's information collection requirements in accordance

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[551] 44 U.S.C. §§ 3501 et seq.

[552] Notice at ¶ 88.

with the Paperwork Reduction Act.[553] In approving the proposed changes, OMB "encouraged the [Commission] to investigate the potential for sunsetting these requirements as competition and other factors allow."[554]

240. In this Order, the Commission adopts none of the changes to our information collection requirements proposed in the Notice. We therefore need not address the OMB's comment, although we note that our decision is consistent with the OMB's recommendation.

241. We conclude, however, that to the extent a BOC refers a customer to a separated affiliate, electronic publishing joint venture or affiliate during the normal course of its telemarketing operations, the BOC must refer that customer to all unaffiliated electronic publishers requesting the referral service, on nondiscriminatory terms. As part of this requirement, BOCs must provide the names of all such unaffiliated electronic publishers, as [5461] well as its own affiliated electronic publishers, in random order, to the customer. Implementation of this requirement is subject to OMB approval as prescribed by the Paperwork Reduction Act.

VII. FURTHER NOTICE OF PROPOSED RULEMAKING

A. Meaning of "Control" and "Financial Interest"

242. We concluded above, in Part III.A, that a BOC engaged in the provision of electronic publishing is subject to section 274 only to the extent that it controls, or has a financial interest in, the content of the information being disseminated over its basic

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[553] Notice of Office of Management and Budget Action, OMB No. 3060-0738 (Sep. 27, 1996).

[554] Id.

telephone services. The record compiled in this proceeding, however, does not provide sufficient detail for us to determine the
meaning of "control" and "financial interest" in this context. By clarifying these terms, we believe we will be in a better position to determine when, and under what circumstances, a BOC's participation in a service constitutes BOC provision of electronic publishing service subject to the requirements of section 274.

1. Meaning of "Control"

243. The term "control" in section 274(i)(4) is defined according to regulations promulgated by the Securities and Exchange Commission implementing the Securities Exchange Act of 1934. As defined thereunder, the term "control" means "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise."[555] We tentatively conclude that this definition, which defines the term "control" in a corporate context, is inappropriate for determining the meaning of "control" in the present context, i.e., when a BOC has "control" of the content of information transmitted via its basic telephone service. We therefore seek comment on how we should determine whether a BOC has "control" of the content of the information being disseminated under section 274.

244. For example, we seek comment on whether an ownership interest is required for a BOC to have "control" of the content of the information. If so, we seek comment on the percentage of ownership interest necessary for the BOC to be deemed to be in "control" of the content of the information.

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[555] See 47 U.S.C. § 274(i)(4), which incorporates by reference 17 C.F.R. § 240.12b-2.

Alternatively, we seek comment on whether "control" should be broadly interpreted to include the ability of a BOC, when acting as a gateway provider, to limit the types of information to which its gateway connects. NYNEX suggests that this ability does not imply the type of "control" over the underlying information being transmitted and, therefore, does not constitute electronic publishing.[556] We seek comment on this interpretation.

[5461] 2. Meaning of "Financial Interest"

245. We also seek comment on the meaning of the term "financial interest." We tentatively conclude that a BOC has a "financial interest" in the content of the information when the BOC owns the information or has a direct or indirect equity interest in the information being disseminated via its basic telephone services. We seek comment on this tentative conclusion. We also seek comment on other forms of BOC participation that should be considered indicia of "financial interest." For example, NYNEX maintains that a "financial interest" in the content of the information should not be interpreted to include receipt of compensation by a BOC for managing and presenting the content of unaffiliated entities as part of its gateway services. Alternatively, PacTel contends that a "financial interest" must be a legally protected property interest." We seek comment on these interpretations.

246. In addition, we seek comment on whether we should establish a de minimis exception to the financial interest requirement once financial interest has been established. For example, if a BOC has a financial interest in only one percent of the content of the information, should it be required to provide the electronic publishing service through a "separated affiliate" or "electronic publishing joint venture"? If not, should the BOC

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[556] NYNEX at 7.

be required to do so if it has a financial interest of ten percent? We seek comment on the percentage of financial interest in an electronic publishing service, as defined in section 274(h), that makes a BOC subject to the requirements of section 274.

B. Meaning of "Transaction" in Section 274(b)(3) and the Requirements of Section 274(b)(3)(B)

247. Section 274(b)(3) provides that a separated affiliate or electronic publishing joint venture established pursuant to section 274(a) and the BOC with which it is affiliated shall "carry out transactions (A) in a manner consistent with such independence, (B) pursuant to written contracts or tariffs that are filed with the Commission and made publicly available, and (C) in a manner that is auditable in accordance with generally accepted accounting standards."[557] We note that the clause in section 274(b)(3)(B), "pursuant to written contracts or tariffs that are filed with the Commission," can be read to require the filing of both contracts and tariffs with the Commission, or only the filing of tariffs. In addition, the phrase "and made publicly available," could refer only to "tariffs" or also to "written contracts." Although the Accounting Safeguards NPRM sought comment on section 274(b)(3), no commenters in that proceeding specifically addressed these issues regarding section 274(b)(3)(B).[558]

[5462] 248. "Filed with the Commission." We seek comment on whether BOCs should be required under section 274(b)(3)(B) to file both written contracts and tariffs on Commission premises. We note that, pursuant to existing practice, BOCs are already required to file tariffs with the

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[557] 47 U.S.C. § 274(b)(3).

[558] See Accounting Safeguards Notice at ¶ 110.

Commission.[559] We also note that section 211 of the Communications Act imposes a general requirement on common carriers to "file with the Commission" copies of "contracts, agreements, or arrangements with other carriers, or with common carriers not subject to the provisions of [the Communications Act]" relating to communications traffic.[560] Our rules implementing this section, however, require only that certain carriers file certain types of contracts with the Commission."[561] As to the remaining contracts within the scope of section 211, carriers are permitted to comply with section 211 by keeping the contracts on their premises such that they are "readily accessible to Commission staff and members of the public upon reasonable request."[562] We invite parties to comment on whether we can and should adopt these procedures to implement the statutory language in section 274(b)(3)(B).

249. "Made Publicly Available." We tentatively conclude that section 274(b)(3)(B) requires that both written contracts and tariffs be made "publicly available." As noted above, BOCs are already required to make their tariffs and certain written contracts with other carriers publicly available by filing them with the Commission and make others contracts accessible upon reasonable request. We find that interpreting this section to require all contracts, as well as tariffs, to be made "publicly available," is necessary to ensure that BOCs are complying with the nondiscrimination and accounting safeguards of the Act and to enable competitors to detect discrimination and potential improper cost allocations by the BOCs. We seek comment on this tentative conclusion.

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[559] 47 U.S.C. § 203.

[560] Id. § 211.

[561] See 47 C.F.R. § 43.51.

[562] Id. § 43.51(c).

250. Assuming that section 274(b)(3)(B) does not require BOCs to file all their written contracts with separated affiliates or electronic publishing joint ventures on Commission premises, we seek comment on the means by which a BOC and its separated affiliate or electronic publishing joint venture must make their contracts "publicly available" pursuant to section 274(b)(3)(B). In interpreting a similar requirement in section 272(b)(5), which requires that BOCs and their section 272 affiliates reduce their transactions to writing and make them available for public inspection,[563] we found that a BOC must make information "available for public inspection" pursuant to that section by making it available at [5463] its corporate headquarters and not the RBOC corporate headquarters or the corporate headquarters of the BOC's holding company.[564] We stated that this information must include a certification statement identical to the certification statement currently required to be included with all Automated Reporting and Management Information System ("ARMIS") reports.[565] We also concluded that detailed written descriptions of transactions between BOCs and their section 272 affiliates must be made available to the public on the Internet within ten days of the transaction.[566] We therefore seek comment on whether, for written contracts within

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[563] See 47 U.S.C. § 272(b)(5), providing that a separate affiliate required by section 272 "shall conduct all transactions with the [BOC] of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection."

[564] Accounting Safeguards Order at ¶ 122 n.298.

[565] See, e.g., Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67, and 69 of the FCC's rules). CC Docket No. 86-182, Order, 4 FCC Rcd 1040, 1124. Such certification statement declares that an officer of the BOC has examined the submission and that to the best of the officer's knowledge all statements of fact contained in the submission are true and the submission is an accurate statement of the affairs of the BOC for the relevant period.

[566] See Accounting Safeguards Order at ¶ 122.

section 274(b)(3)(B) that we decide need not be filed on Commission premises, we should interpret the "publicly available" requirement of this section in the same manner as we interpreted the "available for public inspection" requirement in section 272(b)(5).[567] Commenters disagreeing with this approach should explain why, and propose alternative approaches.

251. Meaning of "Transaction." We also seek comment on what constitutes a "transaction" for purposes of section 274(b)(3).[568] We note that, for purposes of section 272(b)(5), we concluded that only once the BOC and its affiliate have agreed upon the terms and conditions for telephone exchange and exchange access does the agreement constitute a "transaction."[569] We also found that an agreement between a BOC and its affiliate for the provision of unbundled elements and facilities pursuant to explicit terms and conditions also constitutes a "transaction."[570] We seek comment here on whether we should adopt similar conclusions in the context of section 274(b)(3). We note, however, that section 274(d) requires BOCs to provide "network access and interconnections for basic telephone service to electronic publishers at just and reasonable rates that are tariffed (so long as rates for such services are subject to rate regulation)." We therefore tentatively conclude that, although section 274(b)(3)(B) provides that transactions must be carried out pursuant to "written contracts or tariffs," the specific transactions described in section 274(d) may only be carried [5464] out pursuant to tariff (so long as such services are subject to rate regulation). We seek comment on this tentative

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[567] We note that section 272(b)(5) does not make any reference to filings with the Commission.

[568] No commenters addressed this issue in the Accounting Safeguards Order.

[569] Accounting Safeguards Order at ¶ 124.

[570] Id.

conclusion.

C. Procedural Matters

1. Ex Parte Presentations

252. This Further Notice is a non-restricted notice-and-comment rulemaking proceeding. Ex parte presentations are permitted, in accordance with the Commission's rules, provided that they are disclosed as required.[571]

2. Regulatory Flexibility Certification

253. Section 603 of the Regulatory Flexibility Act, (RFA) as amended,[572] requires an initial regulatory flexibility analysis in notice and comment rulemaking proceedings, unless we certify that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[573] A "small entity" is an entity that is independently owned and operated; is not dominant in its field of operation; and meets any additional criteria established by the Small Business Administration (SBA).[574] SBA regulations define small telecommunications entities in SIC code 4813 (Telephone Companies Except Radio Telephone) as entities with fewer than 1,500 employees.[575] This proceeding pertains to the BOCs which, because they are dominant in their field of operation and have

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[571] See generally 47 C.F.R. §§ 1.1200, 1.1202, 1.1204, 1.1206.

[572] 5 U.S.C. § 603.

[573] Id. § 605(b).

[574] The RFA incorporates the definition of small business concerns set forth in 15 U.S.C. § 632(a)(1). 5 U.S.C. § 601(3).

[575] 13 C.F.R. § 121.201.

more than 1,500 employees, do not qualify as small entities under the RFA.[576] We also note that none of the BOCs is a small entity because each BOC is an affiliate of a Regional Holding Company (RHC), and all of the BOCs or their RHCs have more than 1,500 employees.[577] We therefore certify, pursuant to section 605(b) of the RFA, that the tentative conclusions, if adopted, will not have a significant economic impact on a substantial number of small entities. The Secretary shall send a copy of this Further Notice, including this certification and statement, [5465] to the Chief Counsel for Advocacy of the Small Business Administration.[578] A copy of this certification will also be published in the Federal Register.

3. Initial Paperwork Reduction Act of 1995 Analysis

254. This Further Notice contains either a proposed or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the OMB to take this opportunity to comment on the information collections contained in this Further Notice, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on this Further Notice; OMB comments are due 60 days from the date of publication of this Further Notice in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to

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[576] Federal Communications Commission, CCB, Industry Analysis Division, Preliminary Domestic Information From Statistics of Communications Common Carriers, Table 1.1 (July 1996).

[577] Id.

[578] 5 U.S.C. § 605(b).

enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

4. Comment Filing Procedures

255. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before April 4, 1997, and reply comments on or before April 25, 1997. To file formally in this proceeding, you must file an original and six copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original and eleven copies. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C., 20554, with a copy to Janice Myles of the Common Carrier Bureau, 1919 M Street, N.W., Room 544, Washington, D.C., 20554. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C., 20037. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, 1919 M Street, N.W., Room 239, Washington, D.C., 20554.

256. Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also [5466] comply with Section 1.49 and all other applicable sections of the

Commission's Rules.[579] We also direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. All parties are encouraged to utilize a table of contents, regardless of the length of their submission. Parties may not file more than a total of ten (10) pages of ex parte submissions, excluding cover letters. This 10 page limit does not include: (1) written ex parte filings made solely to disclose an oral ex parte contact; (2) written material submitted at the time of an oral presentation to Commission staff that provides a brief outline of the presentation; or (3) written materials filed in response to direct requests from Commission staff. Ex parte filings in excess of this limit will not be considered as part of the record in this proceeding.

257. Parties are also asked to submit comments and reply comments on diskette. Such diskette submissions would be in addition to, and not a substitute for, the formal filing requirements addressed above. Parties submitting diskettes should submit them to Janice Myles of the Common Carrier Bureau, 1919 M Street, N.W., Room 544, Washington, D.C., 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible form using MS DOS 5.0 and WordPerfect 5.1 software. The diskette should be submitted in "read only" mode. The diskette should be clearly labelled with the party's name, proceeding, type of pleading (comment or reply comments) and date of submission. The diskette should be accompanied by a cover letter.

258. Written comments by the public on the proposed and/or modified information collections are due April 4, 1997, and reply comments must be submitted not later than April 25, 1997.

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[579] See 47 C.F.R. § 1.49. However, we require here that a summary be included with all comments and reply comments, regardless of length. This summary may be paginated separately from the rest of the pleading (e.g., as "i, ii").

Written comments must be submitted by the OMB on the proposed and/or modified information collections on or before 60 days after date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, D.C., 20554, or via the Internet to dconway [at] fcc.gov. and to Timothy Fain, OMB Desk Officer, 10236 NEOB. 725 - 17th Street, N.W., Washington, D.C., 20503 or via the Internet to fain t [at] al.eop.gov.

VIII. ORDERING CLAUSES

259. Accordingly, IT IS ORDERED that pursuant to sections 1, 2, 4, 201, 202, 260, 274 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 201, 202, 260, 274, and 303(r), the REPORT AND ORDER IS ADOPTED, and the requirements contained herein will become effective 30 days after publication of a summary [5467] in the Federal Register. The collection of information contained within is contingent upon approval by the OMB.

260. IT IS FURTHER ORDERED that the Secretary shall send a copy of this REPORT AND ORDER, including the final regulatory flexibility certification, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with paragraph 605(b) of the Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

261. IT IS FURTHER ORDERED that pursuant to sections 1, 2, 4, 201, 202, 274 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 201, 202, 274, and 303(r), the FURTHER NOTICE OF PROPOSED RULEMAKING IS ADOPTED.

262. IT IS FURTHER ORDERED that the Secretary shall send a copy of the FURTHER NOTICE OF PROPOSED RULEMAKING, including the regulatory flexibility certification, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with paragraph 603(a) of the Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED
October 20, 1998

No. 97-1113

BELLSOUTH CORPORATION,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents

AT&T Corporation, et al.,
Intervenors

Before: Edwards, Chief Judge, Williams and Sentelle, Circuit Judges

ORDER

Upon consideration of petitioner's petition for rehearing filed June 29, 1998, it is

ORDERED that the petition be denied.

Per curiam

For the Court,
Mark J. Langer, Clerk

Circuit Judge Sentelle would grant the petition for rehearing.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED
October 20, 1998

No. 97-1113

BELLSOUTH CORPORATION,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents

AT&T Corporation, et al.,
Intervenors

Before: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Petitioner's Suggestion for Rehearing In Banc has been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED that the suggestion be denied.

Per curiam

For the Court,
Mark J. Langer, Clerk

Circuit Judge Sentelle would grant the suggestion.
Circuit Judges Wal, Henderson and Garland did not participate in this matter.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED
October 20, 1998

No. 97-1113

BELLSOUTH CORPORATION,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents

AT&T Corporation, et al.,
Intervenors

Before: Edwards, Chief Judge, Williams and Sentelle, Circuit Judges

ORDER

Upon consideration of the petition for rehearing of intervenor U S WEST, Inc., filed June 29, 1998, and of the response thereto, it is

ORDERED that the petition be denied.

Per curiam

For the Court,
Mark J. Langer, Clerk

Circuit Judge Sentelle would grant the petition.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED
October 20, 1998

No. 97-1113

BELLSOUTH CORPORATION,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents

AT&T Corporation, et al.,
Intervenors

Before: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon the consideration of the Suggestion for Rehearing In Banc of Intervenor U S WEST, Inc., the response thereto, and the absence of a request by any member of the court for a vote, it is **ORDERED** that the suggestion be denied.

Per curiam

For the Court,
Mark J. Langer, Clerk

Circuit Judges Wal, Henderson and Garland did not participate in this matter.

APPENDIX D

COMMUNICATIONS ACT, AS AMENDED

SEC. 3. [47 U.S.C. 153] DEFINITIONS

For the purposes of this chapter, unless the context otherwise requires —

(4) Bell operating company

The term "Bell operating company" —

(A) means any of the following companies: Bell Telephone Company of Nevada, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, Michigan Bell Telephone Company, New England Telephone and Telegraph Company, New Jersey Bell Telephone Company, New York Telephone Company, U S West Communications Company, South Central Bell Telephone Company, Southern Bell Telephone and Telegraph Company, Southwestern Bell Telephone Company, The Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Company, The Chesapeake and Potomac Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia, The Diamond State Telephone Company, The Ohio Bell Telephone Company, The Pacific Telephone and Telegraph Company, or Wisconsin Telephone Company; and

(B) includes any successor or assign of any such company that provides wireline telephone exchange service; but

(C) does not include an affiliate of any such company, other than an affiliate described in subparagraph (A) or (B).

SEC. 274. [47 U.S.C. 274] ELECTRONIC PUBLISHING BY BELL OPERATING COMPANIES

(a) LIMITATIONS.—No Bell operating company or any affiliate may engage in the provision of electronic publishing that

is disseminated by means of such Bell operating company's or any of its affiliates' basic telephone service, except that nothing in this section shall prohibit a separated affiliate or electronic publishing joint venture operated in accordance with this section from engaging in the provision of electronic publishing.

(b) SEPARATED AFFILIATE OR ELECTRONIC PUBLISHING JOINT VENTURE REQUIREMENTS.—A separated affiliate or electronic publishing joint venture shall be operated independently from the Bell operating company. Such separated affiliate or joint venture and the Bell operating company with which it is affiliated shall—

(1) maintain separate books, records, and accounts and prepare separate financial statements;

(2) not incur debt in a manner that would permit a creditor of the separated affiliate or joint venture upon default to have recourse to the assets of the Bell operating company;

(3) carry out transactions (A) in a manner consistent with such independence, (B) pursuant to written contracts or tariffs that are filed with the Commission and made publicly available, and (C) in a manner that is auditable in accordance with generally accepted auditing standards;

(4) value any assets that are transferred directly or indirectly from the Bell operating company to a separated affiliate or joint venture, and record any transactions by which such assets are transferred, in accordance with such regulations as may be prescribed by the Commission or a State commission to prevent improper cross subsidies;

(5) between a separated affiliate and a Bell operating company—

(A) have no officers, directors, and employees in common after the effective date of this section; and

(B) own no property in common;

(6) not use for the marketing of any product or service of the separated affiliate or joint venture, the name, trademarks, or service marks of an existing Bell operating company except for names, trademarks, or service marks that are owned by the entity that owns or controls the Bell operating

company;

(7) not permit the Bell operating company—

(A) to perform hiring or training of personnel on behalf of a separated affiliate;

(B) to perform the purchasing, installation, or maintenance of equipment on behalf of a separated affiliate, except for telephone service that it provides under tariff or contract subject to the provisions of this section; or

(C) to perform research and development on behalf of a separated affiliate;

(8) each have performed annually a compliance review—

(A) that is conducted by an independent entity for the purpose of determining compliance during the preceding calendar year with any provision of this section; and

(B) the results of which are maintained by the separated affiliate or joint venture and the Bell operating company for a period of 5 years subject to review by any lawful authority; and

(9) within 90 days of receiving a review described in paragraph (8), file a report of any exceptions and corrective action with the Commission and allow any person to inspect and copy such report subject to reasonable safeguards to protect any proprietary information contained in such report from being used for purposes other than to enforce or pursue remedies under this section.

(c) JOINT MARKETING.—

(1) IN GENERAL.— Except as provided in paragraph (2)—

(A) a Bell operating company shall not carry out any promotion, marketing, sales, or advertising for or in conjunction with a separated affiliate; and

(B) a Bell operating company shall not carry out any promotion, marketing, sales, or advertising for or in conjunction with an affiliate that is related to the provision of electronic publishing.

(2) PERMISSIBLE JOINT ACTIVITIES.—

(A) JOINT TELEMARKETING.— A Bell operating company may provide inbound telemarketing or referral services related to the provision of electronic publishing for a separated affiliate, electronic publishing joint venture, affiliate, or unaffiliated electronic publisher: Provided, That if such services are provided to a separated affiliate, electronic publishing joint venture, or affiliate, such services shall be made available to all electronic publishers on request, on nondiscriminatory terms.

(B) TEAMING ARRANGEMENTS.— A Bell operating company may engage in nondiscriminatory teaming or business arrangements to engage in electronic publishing with any separated affiliate or with any other electronic publisher if (I) the Bell operating company only provides facilities, services, and basic telephone service information as authorized by this section, and (ii) the Bell operating company does not own such teaming or business arrangement.

(C) ELECTRONIC PUBLISHING JOINT VENTURES.—A Bell operating company or affiliate may participate on a nonexclusive basis in electronic publishing joint ventures with entities that are not a Bell operating company, affiliate, or separated affiliate to provide electronic publishing services, if the Bell operating company or affiliate has not more than a 50 percent direct or indirect equity interest (or the equivalent thereof) or the right to more than 50 percent of the gross revenues under a revenue sharing or royalty agreement in any electronic publishing joint venture. Officers and employees of a Bell operating company or affiliate participating in an electronic publishing joint venture may not have more than 50 percent of the voting control over the electronic publishing joint venture. In the case of joint ventures with small, local electronic publishers, the Commission for good cause shown may authorize the Bell operating

company or affiliate to have a larger equity interest, revenue share, or voting control but not to exceed 80 percent. A Bell operating company participating in an electronic publishing joint venture may provide promotion, marketing, sales, or advertising personnel and services to such joint venture.

(d) BELL OPERATING COMPANY REQUIREMENT.— A Bell operating company under common ownership or control with a separated affiliate or electronic publishing joint venture shall provide network access and interconnections for basic telephone service to electronic publishers at just and reasonable rates that are tariffed (so long as rates for such services are subject to regulation) and that are not higher on a per-unit basis than those charged for such services to any other electronic publisher or any separated affiliate engaged in electronic publishing.

(e) PRIVATE RIGHT OF ACTION.

(1) DAMAGES.—Any person claiming that any act or practice of any Bell operating company, affiliate, or separated affiliate constitutes a violation of this section may file a complaint with the Commission or bring suit as provided in section 207 of this Act, and such Bell operating company, affiliate, or separated affiliate shall be liable as provided in section 206 of this Act; except that damages may not be awarded for a violation that is discovered by a compliance review as required by subsection (b)(7) of this section and corrected within 90 days.

(2) CEASE AND DESIST ORDERS.—In addition to the provisions of paragraph (1), any person claiming that any act or practice of any Bell operating company, affiliate, or separated affiliate constitutes a violation of this section may make application to the Commission for an order to cease and desist such violation or may make application in any district court of the United States of competent jurisdiction for an order enjoining such acts or practices

or for an order compelling compliance with such requirement.

(f) SEPARATED AFFILIATE REPORTING REQUIREMENT.—Any separated affiliate under this section shall file with the Commission annual reports in a form substantially equivalent to the Form 10-K required by regulations of the Securities and Exchange Commission.

(g) EFFECTIVE DATES.—

(1) TRANSITION.— Any electronic publishing service being offered to the public by a Bell operating company or affiliate on the date of enactment of the Telecommunications Act of 1996 shall have one year from such date of enactment to comply with the requirements of this section.

(2) SUNSET.— The provisions of this section shall not apply to conduct occurring after 4 years after the date of enactment of the Telecommunications Act of 1996.

(h) DEFINITION OF ELECTRONIC PUBLISHING.—

(1) IN GENERAL.—The term "electronic publishing" means the dissemination, provision, publication, or sale to an unaffiliated entity or person, of any one or more of the following: news (including sports); entertainment (other than interactive games); business, financial, legal, consumer, or credit materials; editorials, columns, or features; advertising; photos or images; archival or research material; legal notices or public records; scientific, educational, instructional, technical, professional, trade, or other literary materials; or other like or similar information.

(2) EXCEPTIONS.—The term "electronic publishing" shall not include the following services:

(A) Information access, as that term is defined by the AT&T Consent Decree.

(B) The transmission of information as a common carrier.

(C) The transmission of information as part of a

gateway to an information service that does not involve the generation or alteration of the content of information, including data transmission, address translation, protocol conversion, billing management, introductory information content, and navigational systems that enable users to access electronic publishing services, which do not affect the presentation of such electronic publishing services to users.

(D) Voice storage and retrieval services, including voice messaging and electronic mail services.

(E) Data processing or transaction processing services that do not involve the generation or alteration of the content of information.

(F) Electronic billing or advertising of a Bell operating company's regulated telecommunications services.

(G) Language translation or data format conversion.

(H) The provision of information necessary for the management, control, or operation of a telephone company telecommunications system.

(I) The provision of directory assistance that provides names, addresses, and telephone numbers and does not include advertising.

(J) Caller identification services.

(K) Repair and provisioning databases and credit card and billing validation for telephone company operations.

(L) 911-E and other emergency assistance databases.

(M) Any other network service of a type that is like or similar to these network services and that does not involve the generation or alteration of the content of information.

(N) Any upgrades to these network services that

do not involve the generation or alteration of the content of information.

(O) Video programming or full motion video entertainment on demand.

(i) ADDITIONAL DEFINITIONS.— As used in this section—

(1) The term "affiliate" means any entity that, directly or indirectly, owns or controls, is owned or controlled by, or is under common ownership or control with, a Bell operating company. Such term shall not include a separated affiliate.

(2) The term "basic telephone service" means any wireline telephone exchange service, or wireline telephone exchange service facility, provided by a Bell operating company in a telephone exchange area, except that such term does not include—

(A) a competitive wireline telephone exchange service provided in a telephone exchange area where another entity provides a wireline telephone exchange service that was provided on January 1, 1984, or

(B) a commercial mobile service.

(3) The term "basic telephone service information" means network and customer information of a Bell operating company and other information acquired by a Bell operating company as a result of its engaging in the provision of basic telephone service.

(4) The term "control" has the meaning that it has in 17 C.F.R. 240.12b-2, the regulations promulgated by the Securities and Exchange Commission pursuant to the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) or any successor provision to such section.

(5) The term "electronic publishing joint venture" means a joint venture owned by a Bell operating company or affiliate that engages in the provision of electronic publishing which is disseminated by means of such Bell operating company's or any of its affiliates' basic

telephone service.

(6) The term "entity" means any organization, and includes corporations, partnerships, sole proprietorships, associations, and joint ventures.

(7) The term "inbound telemarketing" means the marketing of property, goods, or services by telephone to a customer or potential customer who initiated the call.

(8) The term "own" with respect to an entity means to have a direct or indirect equity interest (or the equivalent thereof) of more than 10 percent of an entity, or the right to more than 10 percent of the gross revenues of an entity under a revenue sharing or royalty agreement.

(9) The term "separated affiliate" means a corporation under common ownership or control with a Bell operating company that does not own or control a Bell operating company and is not owned or controlled by a Bell operating company and that engages in the provision of electronic publishing which is disseminated by means of such Bell operating company's or any of its affiliates' basic telephone service.

(10) The term "Bell operating company" has the meaning provided in section 3, except that such term includes any entity or corporation that is owned or controlled by such a company (as so defined) but does not include an electronic publishing joint venture owned by such an entity or corporation.

FILED
MAR 22 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 98-1046, 98-1153

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

BELLSOUTH CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

U S WEST, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION OF MCI TELECOMMUNICATIONS CORPORATION AND AT&T CORP.

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March 22, 1999

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QUESTION PRESENTED

Whether section 274 of the Telecommunications Act of 1996 — which imposes merely a structural separation requirement on the Bell Operating Companies and which expires on February 8, 2000 — constitutes legislative punishment in violation of the Bill of Attainder Clause, U.S. Const. Art. I, § 9, or the constitutional requirement of separation of powers because it applies to those companies by name.

LIST OF PARTIES AND AFFILIATES

The parties to the proceedings in the United States Court of Appeals for the District of Columbia Circuit are listed at BST Pet. ii.

Pursuant to Supreme Court Rule 29.6, respondents state as follows:

MCI Telecommunications Corporation is a wholly owned subsidiary of MCI Communications, Inc., and MCI Communications, Inc. is a wholly owned subsidiary of MCI WORLDCOM, Inc.

MCI WORLDCOM, Inc. has the following non-wholly-owned subsidiaries:

American Communications Services, Inc.
Cogni-Case, Inc.
Embratel Participacoes S.A.
General Communication Inc.
Genesys Telecommunications Laboratories, Inc.
News T Investments, Inc.
News Triangle Finance, Inc.
Portugal Telecom

AT&T Corp. has an equity or debt interest in the following publicly traded companies: Cablevision Systems Corporation, Interactive Network, Inc., and Telewest Communications PLC.

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STATEMENT OF THE CASE

In January, this Court denied multiple petitions for a writ of certiorari filed by the Bell Operating Companies ("BOCs") contending that the United States Court of Appeals for the Fifth Circuit erred when it held that § 274 and other provisions of the Communications Act, 47 U.S.C. §§ 271-275 (the "Special Provisions"), do not violate the Bill of Attainder Clause. *See SBC Communications, Inc. v. FCC*, 119 S. Ct. 889 (1999); *Bell Atlantic v. FCC*, 119 S. Ct. 889 (1999). In the instant petitions, the BOCs once again seek review of a decision of the Court of Appeals — this time the United States Court of Appeals for the District of Columbia Circuit — rejecting their bill of attainder challenge to § 274.[1] All three decisions from the Courts of Appeals to have addressed the BOCs' bill of attainder challenges to the Special Provisions have correctly applied this Court's settled jurisprudence and concluded that the Special Provisions are constitutional. Moreover, § 274, the *only* provision petitioners challenge in this case, expires on February 8, 2000. *See* § 274(g)(2). The instant petitions thus seek what would in all likelihood be an advisory opinion from this Court on a settled issue of constitutional law. The petitions therefore fail to meet any of this Court's requirements for certiorari and should be denied.

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[1]Petitioners also seek certiorari on the D.C. Circuit's unanimous rejection of their First Amendment challenge to § 274. *See* BST Pet. App. 18a-25a (rejecting BOCs' First Amendment challenge); *id.* at 25a (Sentelle, J., dissenting) (agreeing with the majority's First Amendment analysis and conclusion); *see also SBC Communications, Inc. v. FCC*, 154 F.3d 226, 246-47 (5th Cir. 1998) (rejecting BOCs' First Amendment challenge to § 274), *cert. denied*, 119 S. Ct. 889 (1999). Private respondents intervened below to defend § 274 only with respect to the bill of attainder issue. Accordingly, this Brief in Opposition will not address petitioners' First Amendment challenge.

A. Background.

The 20 BOCs — including petitioners BellSouth Corporation and U S WEST, Inc. — exercise monopoly control over local telephone service to more than 80% of America's homes and businesses. Originally, the BOCs were part of the integrated Bell System, and were affiliated with AT&T, which then monopolized the long distance market, and Western Electric, which monopolized the business of manufacturing telecommunications equipment.

The Bell System's dominance rested on the BOCs' control of local networks, which no other firm could afford to duplicate. Each local network consisted of lines and switches that connected all homes and businesses in a BOC's local service area. That network was used to provide local service, but it was also indispensable to long distance service. A long distance call initiated by a customer first traveled from the customer's premises on the BOC's local network to a point where it was handed off to AT&T's long distance facilities, which then transported the call to the recipient's local network for completion. Without access to the local network, no long distance carrier could provide service. BOC cooperation was therefore essential if companies such as MCI Communications, Inc. were to provide competitive long distance service. The same was true about other services (such as electronic publishing) that depended on access to the local network.

The BOCs were divested from AT&T as a result of a 1982 antitrust consent decree (the Modification of Final Judgment or "MFJ"). The MFJ settled an eight-year-old government antitrust suit. The decree was designed to remedy the anticompetitive effects of a single enterprise's ownership of both the "bottleneck" local exchange facilities and competitive long distance, manufacturing, and information services

businesses. The MFJ prohibited the BOCs from entering the markets for long distance telephone services, equipment manufacturing, information services (which included electronic publishing and alarm monitoring), and any nonregulated services.[2]

The administration of the MFJ fell to a single district judge who established a multi-stage procedure, unconstrained by deadlines, for adjudicating BOC requests to remove or modify the MFJ's restrictions. *See United States v. Western Elec. Co.*, 592 F. Supp. 846, 873 & nn.112-14 (D.D.C. 1984). Although the district court waived (at the BOCs' request) the restrictions for a number of peripheral activities where BOC control of the local network posed no threat, and although the district court eventually removed the constraints on information services and non-telecommunications businesses,[3] the court rejected all significant BOC requests to remove or narrow the core long distance and manufacturing restrictions. *See, e.g., United States v. Western Elec. Co.*, 673 F. Supp. 525, 551-52 (D.D.C. 1987) (denying waiver to provide long distance services to customers of their cellular, paging, and other mobile radio services), *aff'd in relevant part*, 900 F.2d 283, 301 n.18 (D.C. Cir. 1990); *United States v. Western Elec. Co.*, 890 F. Supp. 1, 6-8 (D.D.C. 1995) (granting waiver only on restrictive conditions the BOCs could not subsequently meet); *United States v. Western Elec. Co.*, 673 F. Supp. at 543-45 (denying a

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[2]*United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 227-28, 231, 232-34 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

[3]*See United States v. Western Elec. Co.*, 900 F.2d 283, 305-10 (D.C. Cir. 1990) (affirming removal of general restriction and portion of information services restriction); *United States v. Western Elec. Co.*, 993 F.2d 1572, 1582 (D.C. Cir. 1993) (affirming removal of remaining information services restriction).

BOC request to provide long distance services originating *outside* the States where they had local bottleneck monopolies); *United States v. Western Elec. Co.*, 894 F.2d 1387 (D.C. Cir. 1990) (affirming rejection of BOC request for authority to engage in design and development of equipment); *United States v. Western Elec. Co.*, 12 F.3d 225 (D.C. Cir. 1993) (affirming rejection of BOC request for authority to finance development of equipment by independent companies in exchange for royalties).

Unable to secure their objectives through the judicial process, the BOCs successfully petitioned Congress for what amounted to private legislation. In the Telecommunications Act of 1996 (the "1996 Act" or the "Act"), 47 U.S.C. §§ 251-261, the BOCs obtained the legislative relief they had long sought, in legislation that they enthusiastically supported. *See, e.g., BellSouth Corp. v. FCC*, 162 F.3d 678, 691 (D.C. Cir. 1998) ("*BellSouth II*") (noting that "BellSouth's Chairman applauded the Act"). More specifically, Congress accepted the BOCs' longstanding argument that the industry should not be governed by a consent decree administered by "a single Federal district court," S. Rep. No. 104-230, at 9 (1995), and fashioned a new legislative framework designed to open all telecommunications markets to competition. *See* H.R. Conf. Rep. No. 104-458, at 1 (1996). Thus, in § 601 of the Act, Congress provided that the BOCs would cease to be subject to the "restrictions and obligations" of the MFJ and would instead be subject to the "restrictions and obligations" of the Act. Congress also enacted §§ 251-253, which are designed to begin the process of opening local markets to vibrant competition.[4]

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[4]Despite the dismantling of state legal barriers to competitive entry, the BOCs in their regions continue to hold more than 97% of the local market. *See* Common Carrier Bureau, FCC Report on Local Competition (Dec. 5, 1998).

Congress also authorized immediate BOC entry into important segments of the long-distance market previously blocked off by the MFJ. *See, e.g.*, § 271(b)(2) (unconditionally allowing the BOCs immediately to begin providing long distance service anywhere in the country outside their local monopoly regions); § 271(b)(3) (permitting the BOCs immediately to begin providing "incidental interLATA services" such as commercial mobile services (*e.g.*, cellular), without any of the restrictions previously imposed by the MFJ). Moreover, although the Act maintained the core of the MFJ's in-region long-distance restrictions, it authorized lifting them upon a finding by the FCC that the BOC had satisfied certain conditions set forth in the statute. *See* § 271(a).

At the same time, Congress passed § 274, the provision at issue in the instant petitions. That section permits a BOC to "engage in the provision of electronic publishing that is disseminated by means of such Bell operating company's . . . basic telephone service," but temporarily requires a BOC wishing to engage in that line of business to do so through a "separated affiliate" or an "electronic publishing joint venture." § 274(a) (BST Pet. App. 195a-96a).[5] The separated affiliate or joint venture must comply with a number of requirements — including maintaining separate books and observing

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[5]The Act defines electronic publishing to include "the dissemination, provision, publication, or sale" of "news (including sports); entertainment (other than interactive games); business, financial, legal, consumer, or credit materials; editorials, columns, or features; advertising; photos or images; archival or research material; legal notices or public records; scientific, educational, instructional, technical, professional, trade, or other literary materials; or other like or similar information." 47 U.S.C. § 274(h)(1) (BST Pet. App. 200a). Several types of services, including data processing, voice messaging, and video programming, are exempted from § 274's structural separation requirements. *See* § 274(h)(2) (BST Pet. App. 200a-02a).

prohibitions on overlapping directors and common ownership of property — designed individually and collectively to ensure separation. *See generally* § 274(b) (BST Pet. App. 196a-97a). Congress provided that § 274's restrictions expire on February 8, 2000, four years from the date of the passage of the Act. *See* § 274(g)(2) (BST Pet. App. 200a).

Immediately after the 1996 Act became law, the BOCs took advantage of § 601(a) to terminate formally the MFJ in the district court. The district court vacated the MFJ in a brief order entered in April 1996. *See United States v. Western Elec. Co.*, No. 82-0192 (HHG), 1996 WL 255904 (D.D.C. Apr. 11, 1996). Significantly, the BOCs did not question the constitutionality of § 274 or the other Special Provisions. Had any BOC done so, the MFJ court in that proceeding could not have terminated the MFJ without first determining whether those provisions are constitutional and, if not, whether they are severable from § 601(a) or the rest of the 1996 Act.

B. Prior Proceedings.

In February 1997, the FCC adopted a comprehensive report and order implementing, among other things, the "non-accounting requirements of . . . [§]274." *In re Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, First Report and Order and Further Notice of Proposed Rulemaking, 12 F.C.C.R. 5361, at ¶ 2 (1997) (BST Pet. App. 33a, 34a) (the "*Order*"). In the *Order*, the FCC rejected the BOCs' bill of attainder challenges to § 274, concluding that "the section 274 restrictions on BOC provision of electronic publishing services are temporary requirements aimed at protecting against improper cost allocation and discrimination by the BOCs." *Order* ¶ 39 (BST Pet. App. 55a). Noting that "in enacting the 1996 Act, Congress freed BOCs from the terms of an antitrust

consent decree," the FCC also found "no evidence, and BellSouth and U S West . . . offered none, that would support a finding that Congress enacted section 274 to punish the BOCs." *Id.*

In an opinion authored by Judge Williams and joined by Chief Judge Edwards, the D.C. Circuit affirmed. Citing this Court's decisions in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), and *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), the D.C. Circuit rejected at the outset the BOCs' argument that the Bill of Attainder Clause "bars Congress from singling out a specified class of persons for burdens of any kind, regardless of whether those burdens can be viewed as punishments in any ordinary sense of the term." BST Pet. App. 8a. The Court of Appeals noted correctly that this Court has "insisted that the burden must be a punishment to qualify as a bill of attainder." *Id.* at 9a-10a (citing *Nixon*, 433 U.S. at 478-88).

To determine whether the challenged provision constituted "punishment," the D.C. Circuit conducted the "three necessary inquiries" prescribed by this Court: "(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes; and (3) whether the legislative record evinces a congressional intent to punish." BST Pet. App. 10a (quoting *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 852 (1984)) (citations and internal quotations marks omitted). The D.C. Circuit concluded that the Special Provisions did not impose "punishment" under any of those inquiries.

Most important, the Court of Appeals rejected the BOCs' argument that § 274 falls within this Court's understanding of

"historical" punishments. Despite the BOCs' efforts to analogize § 274 to traditional employment debarments, the Court of Appeals properly recognized that "the analogy is very loose indeed." BST Pet. App. 12a. The Court of Appeals noted that § 274 does not even create a "line-of-business restriction," but instead "simply requires structural separation." *Id.* at 12a-13a. Section 274 would thus permit petitioner BellSouth, for example, to engage in electronic publishing through "a wholly-owned subsidiary" that could even "disseminate materials over the telephone lines of BellSouth's BOC subsidiaries, as long as it was kept separate from them in ways proscribed by § 274(b)." BST Pet. App. 13a. The Court of Appeals found that "[w]hile structural separation is hardly costless, neither does it remotely approach the disabilities that have traditionally marked forbidden attainders." *Id.* at 13a. As the Court of Appeals observed, § 274 is "less severe than the analogous pre-1991 MFJ provisions along several dimensions: it applies only to electronic publishing rather than to information services as a whole, it expires after five years rather than continuing indefinitely, and it mandates structural separation rather than complete exclusion." *Id.* at 16a.[6]

The D.C. Circuit also determined that Congress had a nonpunitive legislative purpose in enacting the provision. Judge Williams noted that § 274 "has the earmarks of a rather conventional response to commonly perceived risks of anticompetitive behavior," BST Pet. App. 14a, and is designed to "ensur[e] that no cross-subsidization or unfair competitive practices occur," *id.* (internal quotations omitted).

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[6]Although the Court's opinion stated that § 274's restrictions expire after "five" years, it is undisputed that those restrictions expire *four* years after the passage of the 1996 Act, on February 8, 2000. *See* § 274(g)(2) (BST Pet. App. 200a); *see also* BST Pet. App. 35a ("The requirements under section 274 expire on February 8, 2000.").

Judge Sentelle dissented. *Id.* at 25a-32a. The gravamen of his dissent was that, in light of what he concluded was "the history of treating line-of-business restrictions as punishment," § 274 constituted legislative punishment prohibited by the Bill of Attainder Clause. BST Pet. App. at 29a.

REASONS TO DENY THE PETITIONS

The Petitions for Certiorari should be denied. In January, this Court denied the BOCs' petitions for certiorari raising an identical bill of attainder challenge to § 274 of the Act. At the time this Court denied certiorari, the Court of Appeals in the instant case and two other panels of the Courts of Appeals had addressed the BOCs' bill of attainder challenges to the Special Provisions and all had rejected them. *See SBC Communications, Inc. v. FCC*, 154 F.3d 226 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 889 (1999); *BellSouth II*, 162 F.3d 678. No intervening decision or event provides any basis for this Court to reach a different result now. Indeed, the case for review of the instant petitions is even weaker than was the case for reviewing the BOCs' prior petitions: petitioners here challenge *only* § 274, a provision that expires of its own accord on February 8, 2000, shortly after (or even before) this Court could render a decision on the merits.

Moreover, the decision of the D.C. Circuit does not merit review because it is consistent with the decisions of this Court and the Courts of Appeals, and is entirely correct. As the D.C. Circuit recognized, invalidating a provision under the Bill of Attainder Clause requires not merely specificity, but punishment. The BOCs' argument that § 274 is punitive depends primarily on two propositions: first, that the structural separation requirements imposed by § 274 are indistinguishable from employment bars on individuals; and second, that such employment bars automatically qualify as attainders

irrespective of whether their principal purpose is regulatory. Neither proposition is correct; § 274's restrictions do not "remotely approach" employment bars on individuals, both because § 274's restrictions apply only to regulated corporations, and because those restrictions merely limit the form of those corporations' participation in a particular market rather than prohibit that participation. Further, even genuine employment bars are not automatically regarded as punitive. Congress' evident non-punitive regulatory purpose here of preventing "cross-subsidization and unfair competitive practices" renders § 274 non-punitive. Accordingly, under this Court's settled jurisprudence, § 274 does not violate the Bill of Attainder Clause.

I. Certiorari Should Be Denied Because Section 274 Will Likely Expire Before the Court Can Rule on It.

Conspicuously absent from BellSouth's petition for certiorari is any reference to § 274(g)(2). That provision provides: "Sunset. — The provisions of this section shall not apply to conduct occurring after 4 years after the date of enactment of the Telecommunications Act of 1996." BST Pet. App. 200a. By their own terms, then, the structural separation and other requirements contained in § 274 expire on February 8, 2000. By the time this case was fully briefed, argued, and ready for this Court's decision, the challenged provisions would be about to expire — if they had not already expired — rendering this Court's opinion in effect an advisory one.[7] That

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[7]Despite the fact that § 274's allegedly punitive restrictions were to expire after just four years, the BOCs waited for over a year before challenging the constitutionality of that provision in any court. *See* Petition for Review (filed Feb. 28, 1997), *BellSouth Corp. v. FCC*, 144 F.3d 58 (D.C. Cir.), *petition for cert. filed*, 67 U.S.L.W. 3438 (U.S. Dec. 28, 1998) (No. 98-1046); *SBC Communications, Inc.*, 154 F.3d at 232 (noting that

alone demonstrates that the issues presented in the petitions are not sufficiently important to merit this Court's review.

II. The Court of Appeals Correctly Applied Settled Law in Rejecting the BOCs' Bill of Attainder Challenges.

As noted, three panels of the Courts of Appeals have now considered the BOCs' bill of attainder challenges to the Special Provisions, and all three, including the D.C. Circuit, have rejected them. The unanimity among the Courts of Appeals belies petitioners' suggestion that the decision below is "troubling," BST Pet. 20, "misguided," *id.* at 16, "dangerous," *id.*, "radical[]," U S West Pet. 18, or any of the other hyperbole petitioners employ.

1. It is well established that "laws that impose a duty or liability upon a single individual or firm are not on that account invalid," because "the Bill of Attainder Clause . . . requires not merely 'singling out' but also punishment." *Plaut*, 514 U.S. at 239 n.9. It is also well established that not every legislatively imposed disability constitutes "punishment." *Nixon*, 433 U.S. at 476 n.40 ("[O]ne who complains of being attainted must establish that the legislature's action constituted punishment and not merely the legitimate regulation of conduct"). Some disabilities — such as execution, imprisonment, or banishment — are inherently punitive in light of their "type and severity," and qualify as "punishment" for Attainder Clause purposes irrespective of whether they also serve prophylactic public purposes such as incapacitation or deterrence. Outside that narrow category, however, the Court has made clear "the need to examine the purposes served by a

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SBC filed suit challenging § 274 on July 2, 1997, over sixteen months after passage of the 1996 Act, and that Bell Atlantic Corp. and U S West intervened thereafter).

purported bill of attainder in determining whether it in fact represents a punitive law." *Id.* That is why the second of the three inquiries the Court described as "necessary" in *Selective Service System v. Minnesota Public Interest Research Group* requires evaluation of "whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes." 468 U.S. 841, 852 (1984) (internal quotations omitted).

The BOCs contend that employment bars on individuals fall within the narrow category of inherently punitive disabilities, and they analogize corporate line-of-business restrictions to those employment bars. *See* BST Pet. 15-18; U S West Pet. 18-20. They would treat such restrictions, in other words, as the corporate equivalent of a legislative death penalty imposed on an individual. Even if § 274's separated affiliate requirements imposed a line-of-business restriction (which they do not), and even if line-of-business restrictions on a corporation were analogous to employment bars on individuals (which they are not), the BOCs' arguments would be without merit because employment bars are not inherently punitive. In their effort to rework bill of attainder jurisprudence, the BOCs rely principally on *Nixon* — a case rejecting an Attainder Clause challenge. To be sure, *Nixon* indicated that "a legislative enactment barring designated individuals or groups from participation in specified employments or vocations" might qualify as punishment (especially where "employed against those legislatively branded as disloyal"), 433 U.S. at 474; but *Nixon* did not suggest (much less hold) that such restrictions are automatically classified as punitive. To the contrary, the Court made clear that a "functional" analysis was necessary, and supported that directive by citing the very case the BOCs here assert established an automatic rule of invalidation for restrictions on employment. *Id.* at 475-76 (citing *Cummings v.*

Missouri, 71 U.S. (4 Wall.) 277, 319-20 (1866)).

Cummings itself made clear that restrictions on individuals' pursuit of a profession "may" or may not be punitive, depending on "the circumstances attending and *the causes of* the deprivation." 71 U.S. (4 Wall.) at 320 (emphasis added). The Court's holding that the restrictions at issue were punitive resulted from a careful analysis of whether they were "appropriate as a condition of allowing the exercise of the profession[]," and concluding that there was "no connection" between the restriction imposed and any nonpunitive regulatory purpose. *Id. See also Hawker v. New York*, 170 U.S. 189, 198 (1898) (noting the *Cummings* Court's conclusion that "these oaths had no relation to the fitness or qualification of the two parties"); *Dent v. West Virginia*, 129 U.S. 114, 128 (1889) (same). Thus, far from establishing a rule of automatic invalidation, the authority invoked by the BOCs unambiguously establishes that a restriction on the pursuit of a profession may or may not be punitive, depending on whether it can be justified based on nonpunitive regulatory purposes.

This Court's precedents have always reflected that distinction. In *De Veau v. Braisted*, 363 U.S. 144 (1960), for example, the Court held that a restriction on the ability of convicted felons to hold office in any waterfront labor organization did not constitute punishment for Attainder Clause purposes. As *De Veau* explained, the dispositive inquiry is "whether the legislative aim was to punish th[e] individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation." 363 U.S. at 160. *Accord Flemming v. Nestor*, 363 U.S. 603, 614 (1960) (restriction not punishment where "the source of [the] legislative concern can be thought to be the activity . . . from which the individual is barred, . . . even though it may bear harshly upon one affected"). In contrast,

the only employment bans found by this Court to be punitive under a bill of attainder analysis have been bans imposed on suspected subversives or traitors. *See United States v. Brown*, 381 U.S. 437 (1965) (communists); *United States v. Lovett*, 328 U.S. 303 (1946) (same); *Pierce v. Carskadon*, 83 U.S. (16 Wall.) 234 (1872) (same); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866) (members of the Confederacy); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866) (same). In such situations, the decision to apply the restrictions to suspected traitors, and no others, severely undermined any effort to defend the restrictions on the ground that they sought to regulate the calling rather than punish the person.

In the infrequent instances when Attainder Clause issues have arisen, the Courts of Appeals have applied these settled principles in a straightforward manner that does not remotely suggest a need for guidance from this Court. *See, e.g.*, *BellSouth II*, 162 F.3d at 684; *SBC Communications, Inc.*, 154 F.3d at 241; *McMullen v. United States*, 989 F.2d 603, 612 (2d Cir. 1993); *Brookpark Entertainment Inc. v. Taft*, 951 F.2d 710, 717 (6th Cir. 1991); *Dehainaut v. Pena*, 32 F.3d 1066, 1071 (7th Cir. 1994); *WMX Technologies, Inc. v. Gasconade County*, 105 F.3d 1195, 1202 (8th Cir. 1997); *Fresno Rifle and Pistol Club, Inc. v. Van de Kamp*, 965 F.2d 723, 727 (9th Cir. 1992). As the D.C. Circuit below noted, quoting Professor Tribe's treatise, "'Even measures historically associated with punishment — such as permanent exclusion from an occupation — have been otherwise regarded when the nonpunitive aims of an apparently prophylactic measure have seemed sufficiently clear and convincing.'" BST Pet. App. 13a-14a (quoting Laurence H. Tribe, American Constitutional Law § 10-5, at 655 (2d ed. 1988)). Similarly, the Seventh Circuit has previously held that "[e]ven where a fixed identifiable group . . . is singled out and a burden traditionally associated with punishment — such as permanent exclusion from an

occupation — is imposed, the enactment may pass scrutiny under bill of attainder analysis if it seeks to achieve legitimate and non-punitive ends and was not clearly the product of punitive intent." *Dehainaut v. Pena*, 32 F.3d at 1071. In short, courts and commentators have uniformly recognized that what petitioners now characterize as a "misguided mode of analysis," BST Pet. 16, is precisely the analysis that this Court in *Selective Service System* described as "necessary." 468 U.S. at 852 (requiring inquiry into whether the provisions "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes") (internal quotations omitted). It is thus hardly surprising that the D.C. Circuit in the case at bar, the Fifth Circuit in *SBC Communications, Inc.*, and the D.C. Circuit in *BellSouth II* all analyzed the constitutionality of the Special Provisions in the same manner and reached the same result.

2. Moreover, the structural separation requirements imposed by § 274 are at least two steps removed from the employment bans on individuals that this Court has found may (or may not) be punitive. First, a line-of-business restriction on a corporation does not implicate the same individual liberty interests as employment restrictions on an individual, *cf. Cummings*, 71 U.S. at 321 ("The theory upon which our political institutions rest is, that all men have certain inalienable rights — that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike—open to everyone."), particularly when that corporation participates in a heavily regulated industry in which licensing requirements and entry tests are commonplace. *See* BST Pet. App. 12a (noting that this Court "in *Brown* strongly suggested that line-of-business restrictions pose no bill of attainder concerns");

BellSouth II, 162 F.3d at 688 (noting that "we do not endorse" the BOCs' assumptions that "the restrictions of § 271 [are] equivalent to an employment bar").

Second, and more important, § 274 does not impose a line-of-business restriction; instead, it "simply requires structural separation." BST Pet. App. 13a. Indeed, § 274 makes abundantly clear that each BOC may not only engage in electronic publishing, it may do so even over its own local telephone network, as long as it complies with the separation requirements imposed by § 274. *See* BST Pet. App. 13a ("BellSouth itself could enter the electronic publishing business provided it observed the norms of separation from its BOCs."); *BellSouth II*, 162 F.3d at 683 ("§ 274 allows the BOCs to provide electronic publishing if they do so through a separate affiliate"). The D.C. Circuit was thus correct to conclude that § 274's structural separation requirements do not "remotely approach the disabilities that have traditionally marked forbidden attainders." BST Pet. App. 13a.

3. Nor is there merit to the BOCs' suggestion that the Act's exclusion of GTE and others from § 274's structural separation requirements undermines Congress' non-punitive purposes. BST Pet. 18-20. The BOCs' arguments along these lines must be viewed with skepticism, for as this Court has noted, "[h]owever expansive the prohibition of bills of attainder, it surely was not intended to serve as a variant of the equal protection doctrine, invalidating every Act of Congress . . . that legislatively burdens some persons or groups but not all plausible individuals." *Nixon*, 433 U.S. at 471 (footnote omitted).

The D.C. Circuit correctly recognized that Congress' decision to treat the BOCs differently from other local carriers is "neither suggestive of punitive purpose nor particularly

suspicious." BST Pet. App. 17a; *see also SBC Communications, Inc.*, 154 F.3d at 243 ("the mere fact that the Special Provisions are limited in application to the BOCs (and thus do not cover other LECs with substantial local market power, like GTE) does not cast substantial doubt on the fit of this tailoring"). Although GTE and the nation's remaining local telephone companies are also monopolies, they have operations that are geographically dispersed, serve overwhelmingly rural and suburban areas, or are far smaller. For these reasons, federal courts and the United States Department of Justice have long concluded that the BOCs should be treated differently from all other local carriers because their massive, concentrated monopoly facilities gave them an ability to discriminate and cross-subsidize not shared by other local carriers — including GTE.[8] *See* BST Pet. App.

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[8] *See, e.g., Competitive Status of the Bell Operating Companies: Hearing on H.R. 3687 and H.R. 3800, Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 99th Cong. 86 (Mar. 13, 1986) (testimony of Douglas H. Ginsburg, Assistant Attorney General) ("The GTE telephone subscribers are not only many fewer in number than any of the RBOC's, but they are scattered geographically around the country."); *id.* at 87 (noting the benefit to "being able to compare, for the local public service commission, the presentations made by one company as compared with another in the same state, so that significant discrepancies in their cost claims can be identified"); *Telecommunications: The Role of the Department of Justice: Hearing Before the House Committee on the Judiciary*, 104th Cong. 66 (May 9, 1995) (testimony of Anne K. Bingaman, Assistant Attorney General) (relying on same distinction to explain "why the BOCs were subject to the line-of-business restrictions while GTE was allowed to offer long distance services through a separate subsidiary"); *see also United States v. GTE Corp.*, 603 F. Supp. 730, 753 (D.D.C. 1984) (concluding that GTE "lacks the vast market domination . . . that would enable it to engage in anticompetitive practices irrespective of injunctions and separate affiliate provisions"); *United States v. Western Elec. Co.*, 673 F. Supp. 525, 549 (D.D.C. 1987) (expressly rejecting the argument that the BOCs were indistinguishable from GTE and that the MFJ's line of business

17a (noting that the concentration of the BOCs' facilities gives them a greater opportunity to cross-subsidize and that the absence of "benchmarks" makes that cross-subsidization harder to detect); *SBC Communications, Inc.*, 154 F.3d at 243 (same).[9]

4. Finally, the BOCs suggest that their contention that § 274 is punitive must be considered without reference to the context in which § 274 was passed and, in particular, without reference to the substantial benefits bestowed by the 1996 Act. BST Pet. 22 n.13. The BOCs' desperation to excise § 274 from its context demonstrates how devastating that context is to claims that § 274 is punitive. To be sure, as noted above, *see supra* p. 8, § 274 reimposes some of the original MFJ restrictions that had been lifted subsequently by the MFJ court. But, as the D.C. Circuit observed, the BOCs' claim that § 274 imposes punishment is "undermined by § 274's placement in an Act that as a whole *relieves* the BOCs of several of the burdens imposed by the MFJ." BST Pet. App. 14a (emphasis in original); *see also SBC Communications, Inc.*, 154 F.3d at 244 ("[W]e conclude that the Special Provisions are not punitive because they were part of a larger quid pro quo. . . . For example, although the information services restriction lifted under the MFJ was partially reimposed under § 274, the BOCs were immediately freed, by operation of § 601(a)(1) and

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restrictions thus should be removed), *aff'd in part and rev'd in part on other grounds*, 900 F.2d 283 (D.C. Cir. 1990).

[9]BellSouth also chastises Congress for failing "to make any such finding to support its alleged 'regulatory' purpose." BST Pet. 19. But as this Court has often noted, "Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 666 (1994); *see also Katzenbach v. McClung*, 379 U.S. 294, 299 (1964) (noting, in Commerce Clause context, that "no formal findings were made, which of course are not necessary").

the other Special Provisions, from existing MFJ restrictions on their ability to offer incidental and out-of-region long distance service."). "[T]he Special Provisions," as the Fifth Circuit concluded, "represent a hard-fought compromise on a massive issue of public policy which, in the end, contained both good and bad elements for the BOCs"; a "legislative quid pro quo on this level simply cannot be punitive for attainder purposes." 154 F.3d at 244.[10]

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[10]The BOCs also suggest that the long distance provisions of the 1996 Act "can hardly be considered 'benefits' for the BOCs." BST Pet. 22 n.13. That contention is nonsense. *See, e.g.*, *BellSouth II*, 162 F.3d at 691 ("as a qualitative matter, the BOCs are no worse off under § 271 than they were under the MFJ; and there are many who think their position has vastly improved"); BST Pet. App. 14a (noting that the Act "as a whole *relieves* the BOCs of several of the burdens imposed by the MFJ") (emphasis in original); *SBC Communications, Inc.*, 154 F.3d at 244 (noting the substantial long distance benefits bestowed "by operation of § 601(a)(1) and the other Special Provisions").

CONCLUSION

The petitions for a writ of certiorari should be denied.

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Nos. 98-1046 and 98-1153

In the Supreme Court of the United States

OCTOBER TERM, 1998

BELLSOUTH CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

U S WEST, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether 47 U.S.C. 274—which provides that, until February 8, 2000, a Bell Operating Company (BOC) and its affiliates may engage in electronic publishing disseminated through the BOC's own basic telephone service only by means of a separated affiliate or joint venture—violates the Bill of Attainder Clause or the First Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a[1]) is reported at 144 F.3d 58. The First Report and Order

[1] "BellSouth Pet." refers to the petition for a writ of certiorari in No. 98-1046; "U S WEST Pet." refers to the petition for a writ of certiorari in No. 98-1153. "Pet. App." refers to the appendix to the petition in No. 98-1046.

of the Federal Communications Commission (Pet. App. 33a-190a) is reported at 12 F.C.C.R. 5361.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1998. On June 29, 1998, petitioners filed petitions for rehearing, which were denied on October 20, 1998. Pet. App. 191a-194a. The petition for a writ of certiorari in No. 98-1046 was filed on December 28, 1998, and the petition for a writ of certiorari in No. 98-1153 was filed on January 19, 1999. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. For many years, most telephone service in the United States—both local and long-distance—was provided by AT&T and its corporate affiliates, collectively known as the Bell System. In 1974, the United States sued AT&T under the Sherman Act, alleging, among other things, that the Bell System had improperly used its monopoly power in local telephone markets to impede competition in the long-distance market. See *United States* v. *AT&T Co.*, 524 F. Supp. 1336 (D.D.C. 1981). In 1982, to settle that lawsuit, AT&T entered into a consent decree—which became known as the Modification of Final Judgment, or MFJ—that required it to divest its local exchange operations. The newly independent Bell Operating Companies (BOCs) continued to provide monopoly local exchange service in their respective regions, while AT&T continued to provide nationwide long-distance service. The BOCs were initially grouped into seven corporate entities known as "Regional Bell Operating Companies," or RBOCs. See *United States* v. *AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982), aff'd *sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983). After recent mergers, that

number now stands at five: Bell Atlantic, BellSouth, SBC Communications, Ameritech, and U S WEST.

The consent decree, overseen for many years by the federal district court in Washington, D.C., prohibited the BOCs from providing "inter-LATA" (long-distance) telephone service, manufacturing telecommunications equipment, and providing information services, including electronic publishing. In approving the decree's restriction on the provision of information services, the district court explained that a BOC, if permitted to enter the information services market, could use its monopoly control over local telephone facilities (through which information services are largely provided) to impede competition in two principal ways: The BOC could subject competitors to discriminatory terms of access to the local telephone network, and it could cross-subsidize its own information services with its monopoly local revenues. *AT&T*, 552 F. Supp. at 189.

The Department of Justice subsequently joined with the BOCs in requesting that the decree's information services restriction be lifted. Although the district court initially rejected that request, see *United States* v. *Western Elec. Co.*, 673 F. Supp. 525, 562-567 (D.D.C. 1987); *United States* v. *Western Elec. Co.*, 714 F. Supp. 1, 3-5 (D.D.C. 1988), the court of appeals held that because the proposed modification was uncontested by any of the parties to the decree, the district court was obligated to approve it "so long as the resulting array of rights and obligations is within the *zone of settlements* consonant with the public interest *today*." *United States* v. *Western Elec. Co.*, 900 F.2d 283, 307 (D.C. Cir.) (citation omitted), cert. denied, 498 U.S. 911 (1990). The appeals court acknowledged that "the district court had before it evidence to support its findings

on the risk of discrimination and cross-subsidization." *Id.* at 308. On the other hand, the court added, "the record also contains considerable evidence cutting the other way." *Ibid.* Rather than "resolving these disputed factual issues," *ibid.*, the court remanded the case to the district court for further proceedings, *id.* at 309.

On remand, the district court lifted the information services restriction. *United States* v. *Western Elec. Co.*, 767 F. Supp. 308, 332 (D.D.C. 1991). The district court stated that the RBOCs continued to derive market power "from their still almost complete domination over the 'last mile' of the telephone network, *i.e.*, their monopoly of the local wires and switches," without which most competitors could not reach the ultimate consumers of telephone-based information services. 767 F. Supp. at 314. The court also believed that to lift the restriction "would be to court a significant risk of anticompetitive activities on a substantial scale," as well as to invite the RBOCs to "divert ratepayer funds to its * * * information services activities," thereby "enabl[ing] the company to undersell its independent rivals in the information services market long and effectively enough to drive them from the market." *Id.* at 324. Nonetheless, the court felt bound by the court of appeals' mandate to lift the restriction, because it could not be "*certain*" that removing it would damage competition. *Id.* at 331. The court of appeals affirmed. *United States* v. *Western Elec. Co.*, 993 F.2d 1572, 1582 (D.C. Cir.), cert. denied, 510 U.S. 894 (1993).

2. Meanwhile, Congress itself began reexamining the issues raised by the consent decree, including the necessity for an information services restriction. See, *e.g.*, H.R. Rep. No. 850, 102d Cong., 2d Sess. 1-2, 7, 15 (1992). Those efforts eventually produced legislative proposals to require the BOCs to employ separate

affiliates or joint ventures if they wished to provide "electronic publishing" (a subset of information services) through their own basic telephone service. See, *e.g.*, H.R. Rep. No. 559, 103d Cong., 2d Sess., Pt. 1, at 55-59 (1994) (discussing H.R. 3626, § 203).

Those proposals were ultimately enacted as part of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act), which comprehensively reforms telecommunications regulation in the United States. See generally *AT&T Corp.* v. *Iowa Utils. Bd.*, 119 S. Ct. 721 (1999). Among other things, the 1996 Act prospectively eliminates the restrictions of the consent decree. § 601(a), 110 Stat. 143. It automatically entitles all BOCs to provide, for the first time, "out-of-region" long-distance services (*i.e.*, long-distance services originating outside the States in which a BOC was authorized to provide local telephone service on the date of the statute's enactment); and it establishes a mechanism by which any BOC may seek to provide, also for the first time, full long-distance telephone service originating within its "in-region" States. 47 U.S.C. 271.[2] The statute further establishes the conditions under which a BOC may engage in the manufacture of telecommunications and customer premises equipment. 47 U.S.C. 273; see also 47 U.S.C. 275 (short-term

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[2] The 1996 Act defines "Bell operating company" as 20 listed local telephone companies that had been wholly-owned subsidiaries of the pre-divestiture AT&T, as well as "any successor or assign of any such company that provides wireline telephone exchange service." 47 U.S.C. 153(4) (Supp. II 1996); see also 47 U.S.C. 274(i)(10). The definition includes "South Central Bell Telephone Company" and "Southern Bell Telephone and Telegraph Company," 47 U.S.C. 153(4) (Supp. II 1996), both of which are wholly-owned subsidiaries of petitioner BellSouth Corporation, and also includes "U S West Communications Company." *Ibid.*

restriction on BOC alarm-monitoring services). Finally, the interim provision challenged here, Section 274, governs BOC provision of "electronic publishing":

> No Bell operating company or any affiliate may engage in the provision of electronic publishing that is disseminated by means of such Bell operating company's or any of its affiliates' basic telephone service, except that nothing in this section shall prohibit a separated affiliate or electronic publishing joint venture operated in accordance with this section from engaging in the provision of electronic publishing.

47 U.S.C. 274(a). By its terms, Section 274 expires "4 years after February 8, 1996," the date of the 1996 Act's enactment. 47 U.S.C. 274(g)(2).

Even while it is in effect, Section 274 permits a BOC to provide electronic publishing in two ways. First, a BOC may provide its own electronic publishing services without restriction so long as it does not disseminate such publishing by means of its "basic telephone service." 47 U.S.C. 274(a); see 47 U.S.C. 274(i)(2). Second, electronic publishing services may be provided even through a BOC's basic telephone service so long as the service comes from a "separated affiliate," see 47 U.S.C. 274(i)(9), or an "electronic publishing joint venture," see 47 U.S.C. 274(i)(5), operated in accordance with the statute's requirements. See 47 U.S.C. 274(b)(5); 274(c)(2)(C).

3. On July 18, 1996, the FCC began a rulemaking proceeding to implement several provisions of the 1996 Act, including Section 274. *In the Matter of Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, 11 F.C.C.R. 18,959 (Notice of Proposed

Rulemaking). In that proceeding, BellSouth and U S WEST argued that Section 274's separation requirements violate the First Amendment and the Bill of Attainder Clause. See U.S. Const. Art. I, § 9, Cl. 3. The FCC considered and rejected those constitutional contentions. *In the Matter of Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, 12 F.C.C.R. 5361, 5376 (¶ 37) (First Report and Order and Further Notice of Proposed Rulemaking Feb. 7, 1997) (Pet. App. 53a-54a). Joined by intervenor U S WEST, BellSouth filed a petition for review.

4. The court of appeals denied BellSouth's petition for review and upheld Section 274's constitutionality. Pet. App. 1a-32a. The court first rejected the contention that Section 274 is an unconstitutional bill of attainder. Applying the three-part test contained in *Selective Service System* v. *Minnesota Public Interest Research Group*, 468 U.S. 841, 852 (1984), the court found that Section 274 does not impose "punishment" within the meaning of the constitutional proscription. The court first rejected the contention that Section 274 should be placed "among the burdens historically forbidden as attainders." Pet. App. 12a-13a. It explained that the provision "does not bar the BOCs from electronic publishing but simply requires structural separation," (*id.* at 13a), and that even if the provision had unconditionally restricted the BOCs from providing electronic publishing services, it would be "nothing more than a line-of-business restriction" (*id.* at 12a). The court next found that Section 274 could "reasonably be said to further nonpunitive legislative purposes." Pet. App. 13a. Indeed, the court observed, by imposing a structural separation requirement, "§ 274 has the earmarks of a rather conventional response to com-

monly perceived risks of anticompetitive behavior." *Id.* at 14a. Finally, the court found that the "few scattered remarks referring to anticompetitive abuses allegedly committed by the BOCs in the past" did not constitute the "unmistakable evidence of punitive intent" required to support a bill of attainder claim. *Id.* at 17a-18a.

The court of appeals also rejected the claim that Section 274 violates the First Amendment. Pet. App. 18a-25a. Applying intermediate scrutiny, the Court found that the interest underlying Section 274—"to promote competition by discouraging discrimination and cross-subsidization by the BOCs"—is both "important" and "unrelated to the suppression of free speech." Pet. App. 22a. "[I]ndeed," the Court observed, "the interest in preventing truly anticompetitive behavior in the electronic publishing marketplace is an interest in the enhancement of speech." *Id.* at 22a-23a.

Judge Sentelle dissented from the appeals court's rejection of petitioners' bill of attainder claims (Pet. App. 25a-32a), but "agree[d] with the majority's analysis and with its conclusion" on the First Amendment issues (*id.* at 25a).

ARGUMENT

1. The Fifth Circuit recently rejected constitutional challenges to provisions of the 1996 Act, including Section 274, applicable specifically to the BOCs. See *SBC Communications, Inc.* v. *FCC*, 154 F.3d 226 (1998); see also note 3, *infra*. On January 19, 1999, three weeks after the petition in No. 98-1046 was filed and on the same day that the petition in No. 98-1153 was filed, this Court denied certiorari in *SBC Communications*. See 119 S. Ct. 889 (Nos. 98-652 and 98-653). Nothing has happened in the intervening weeks to make certiorari more appropriate now than it was then.

Indeed, this case is an even less appropriate candidate for certiorari than was *SBC Communications*. Unlike that case, which involved the constitutionality of Sections 271 through 275, this case involves a challenge only to Section 274. By its terms, Section 274 will expire less than a year from now: on February 8, 2000. See 47 U.S.C. 274(g)(2). Any decision by this Court would thus have very limited practical significance, even if the decision could be issued before the parties' dispute becomes moot. This Court does not ordinarily grant certiorari to consider challenges to provisions that will expire of their own force shortly after—or perhaps even before—the Court could render a decision on the merits. For that reason alone, the petitions should be denied.

2. As in *SBC Communications*, the BOCs challenge Section 274 as an unconstitutional bill of attainder.[3] That challenge is without merit for the reasons set forth in the opinion below and in our brief in opposition to certiorari in *SBC Communications*. See 98-652 U.S. Br. in Opp. at 8-16. Rather than repeat our earlier discussion in its entirety, we provide only a summary here.[4]

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[3] To date, three different court of appeals panels have rejected the BOCs' bill-of-attainder challenges to various provisions of the 1996 Act: the Fifth Circuit panel in *SBC Communications*, the panel below, and another panel of the D.C. Circuit in *BellSouth Corp.* v. *FCC*, 162 F.3d 678 (1998). The latter case involved a challenge to Section 271, and the D.C. Circuit rejected that challenge without viewing the decision below, which addresses only Section 274, as controlling authority. See *id.* at 683.

[4] We have served counsel for petitioners with copies of our brief in opposition in *SBC Communications*. (Counsel of record for BellSouth was also counsel of record for SBC Communications in the previous case.)

A statute is a prohibited "bill of attainder" only if it both applies with specificity *and* imposes punishment. *E.g.*, *Selective Serv. Sys.* v. *Minnesota Pub. Interest Research Group*, 468 U.S. 841, 851 (1984). The flaw in petitioners' bill-of-attainder challenge here is basic: nothing in the challenged provisions can plausibly be characterized as "punishment." To support their contrary conclusion, petitioners mistakenly rely on cases involving the imposition of punitive disabilities on adherents of a vilified political movement—either the Confederacy or the Communist Party—that was "thought to present a threat to the national security." *United States* v. *Brown*, 381 U.S. 437, 453 (1965); see 98-652 U.S. Br. in Opp. at 9. This case has nothing in common with those. Line-of-business regulations based on corporate economic power and incentives, unlike sanctions based on a flesh-and-blood individual's political affiliation, are a legal commonplace. See, *e.g.*, *Turner Broad. Sys.* v. *FCC*, 512 U.S. 622, 664 (1994) (*Turner I*). They rest not on a desire to "punish" the regulated corporations, but on a recognition of the objective dangers posed by monopoly power. See *North Am. Co.* v. *SEC*, 327 U.S. 686, 711 (1946). Here, as one former FCC chairman told Congress, line-of-business restrictions were needed "not because the BOCs are venal," but because, in the absence of such restrictions, "they would be following the natural instincts of rational businessmen" in using their monopoly power to defeat competition. *Telecommunications Policy Act (Part I): Hearing Before the Subcomm. on Telecomm. and Fin. of the House Comm. on Energy and Commerce*, 101st Cong., 2d Sess. 427 (1990) (testimony of Richard E. Wiley).

Moreover, "[p]lacing § 274 among the burdens historically forbidden as attainders seems especially

dubious because it does not bar the BOCs from electronic publishing but simply requires structural separation." Pet. App. 12a-13a. Under the statute, petitioners are free to establish a wholly-owned subsidiary to engage in electronic publishing—or to engage in electronic publishing directly—so long as they observe the statute's structural separation requirements. *Id.* at 13a. "While structural separation is hardly costless, neither does it remotely approach the disabilities that have traditionally marked forbidden attainders." *Ibid.*[5]

Because they cannot plausibly characterize the challenged provisions as "punitive," petitioners devote much of their discussion to the provisions' specificity, as

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[5] BellSouth seeks to minimize the fact that Section 274 permits other "member[s] of the BellSouth corporate family (outside of the BOC's control)" to engage in electronic publishing, reasoning that the statute "is a complete prohibition" on the ability of its BOC subsidiaries and their affiliates to provide electronic publishing over their local telephone networks. BellSouth Pet. 21; see also U S WEST Pet. 20-21. But there can be no dispute that the statute "leaves all the investors with stakes in the BOCs (i.e., the shareholders of the RBOCs) free to pursue their collective electronic publishing ends, and to aggregate their capital to achieve those ends, subject only to structural separation requirements." Pet. App. 13a. Moreover, even if corporate line-of-business restrictions of this sort could be plausibly compared to professional disabilities imposed on flesh-and-blood individuals, it is well-settled that even the latter kinds of disabilities are permissible "when the nonpunitive aims of an apparently prophylatic measure have seemed sufficiently clear and convincing." Laurence H. Tribe, *American Constitutional Law* § 10-5, at 655 (2d ed. 1988). "The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation." *Flemming* v. *Nestor*, 363 U.S. 603, 614 (1960).

though specificity alone could convert a nonpunitive statute into a bill of attainder. But the need to show specificity and the need to show punitiveness are separate requirements for any bill-of-attainder challenge, and there is "no warrant in the precedents for treating Congress's specification of the BOCs by name as a material element in the punishment analysis." Pet. App. 10a. Indeed, petitioners' argument is irreconcilable with *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977). There, this Court rejected the notion that "the Constitution is offended whenever a law imposes undesired consequences on an individual or on a class that is not defined at a proper level of generality," *id.* at 469-470, and it observed that a variety of valid statutes "single out identifiable members of groups to bear burdens or disqualifications," *id.* at 471 n.34 (citing *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974)). Similarly, in *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), the Court reaffirmed that a valid bill-of-attainder challenge "requires not merely 'singling out' but also *punishment*." *Id.* at 239 n.9 (emphasis in original). In the absence of punishment, Congress may legislate not just with great specificity, but may in fact "legislate a legitimate class of one." *Ibid.* (internal quotation marks omitted).

There is similarly no merit to petitioners' challenge to the rationality of Congress's distinction between the BOCs and the other local exchange carriers for purposes of regulations guarding against discrimination and cross-subsidization. As we discuss in our brief in opposition in *SBC Communications*, Congress had ample reason to differentiate between the local exchange progeny of the Bell System, which "provide over 80% of local telephone service in the United States" (H.R. Rep. No. 204, 104th Cong., 1st Sess., Pt.

1, at 49 (1995)), and the so-called "independent" carriers, which generally serve markets that are more widely dispersed or lower in population density. See 98-652 U.S. Br. in Opp. at 9-10, 17-20. As the court of appeals recognized, the statute's "differential treatment of the BOCs and non-BOCs," including GTE Corporation, is "neither suggestive of punitive purpose nor particularly suspicious." Pet. App. 17a; accord *SBC Communications*, 154 F.3d at 243; *BellSouth Corp.*, 162 F.3d at 689-690. And, although BellSouth takes issue (Pet. 19-20) with the court's analysis of the risks posed specifically by the BOCs, it cannot reasonably suggest that those risks are "so feeble that no one could reasonably assert them except as a smokescreen for some invidious purpose (much less for the specific invidious purpose of 'punishing' the BOCs)." Pet. App. 15a-16a.

Finally, any assertion of punitive purpose is "undermined by § 274's placement in an Act that as a whole *relieves* the BOCs of several of the burdens imposed by the MFJ, particularly by prescribing in § 271 a method whereby the BOCs can achieve a long-sought-after presence in the long-distance market." Pet. App. 14a. Indeed, the final version of the 1996 Act as a whole was supported by the BOCs and their holding company parents. See *SBC Communications*, 154 F.3d at 244; see also 142 Cong. Rec. S393 (daily ed. Jan. 26, 1996) (statement of Sen. Pressler); *id.* at S696 (daily ed. Feb. 1, 1996) (statement of Sen. Kerrey); *id.* at S699 (statement of Sen. Lott). The BOCs' support for the 1996 Act suggests that they too recognized that the limitations imposed by Section 274's structural restrictions were "part of a larger quid pro quo" (*SBC Communications*, 154 F.3d at 244) that liberated them from the long-distance and manufacturing restrictions of the consent decree and, on the whole, benefited, rather than

harmed, their corporate interests. See also *BellSouth Corp.*, 162 F.3d at 690-691.[6]

3. Like the Fifth Circuit in *SBC Communications*,[7] the court of appeals also correctly rejected petitioners' contention that Section 274 violates the First Amendment. "The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas." *Turner I*, 512 U.S. at 657. Here, Section 274 imposes short-term structural protections concerning the manner in which the BOCs may engage in the provision of electronic publishing services, regardless of the message or views being transmitted. Those interim protections are entirely consistent with the First Amendment; indeed, as the court of appeals recognized, "the interest in preventing truly anticompetitive behavior in the electronic publishing marketplace is an interest in the enhancement of speech." Pet. App. 22a-23a.

a. Petitioners contend that Section 274 is subject to strict First Amendment scrutiny because it applies to the electronic publishing activities of a specific group of companies. See BellSouth Pet. 24-25; U S WEST Pet.

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[6] U S WEST contends (Pet. 27) that the decision below "infringe[s] on the constitutional separation of powers." U S WEST has not clearly preserved, and the court of appeals did not address, any separation-of-powers argument distinct from the bill-of-attainder challenge. In any event, Section 274 presents no separation-of-powers concerns. See generally 98-652 U.S. Br. in Opp. at 20-22; see also *Plaut*, 514 U.S. at 239 & n.9.

[7] That court ruled that petitioners' First Amendment challenge was "entirely lacking in merit," 154 F.3d at 247, a holding that went unchallenged in the petitions for certiorari in that case.

11-15. But laws favoring some speakers over others are subject to strict scrutiny only "when the legislature's speaker preference reflects a content preference." *Turner I*, 512 U.S. at 658. Strict scrutiny is unwarranted when "the differential treatment is 'justified by some special characteristic of' the particular medium being regulated." *Id.* at 660-661 (citation omitted).[8] In this case, Congress focused on the BOCs not because of any particular message they might convey, but because of the nature of their monopoly control over the local telephone lines on which electronic publishers rely to reach the ultimate consumers of their information. Because the BOCs' "bottleneck monopoly power" (*id.* at 661) poses a distinct threat to independent electronic publishers, and because Section 274 is designed to address that specific threat, the fact that Section 274 applies only to the BOCs poses no First Amendment concern.[9]

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[8] Petitioners' reliance on *Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), and *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221 (1987), is unsound. Those cases "mean[] only that strict scrutiny must be applied to regulations that target a small subset of media organizations in ways that threaten to 'distort the market for ideas,'" a concern that is absent here. Pet. App. 20a (quoting *Turner I*, 512 U.S. at 660). As this Court recently reaffirmed, "[i]t would be error to conclude * * * that the First Amendment mandates strict scrutiny for any speech regulation that applies to one medium (or a subset thereof) but not others." *Turner I*, 512 U.S. at 660.

[9] BellSouth complains (Pet. 25 & n.15) that Congress acted improperly in not extending Section 274 to non-BOC carriers such as GTE. As discussed above, however, Congress had a legitimate basis for distinguishing between the local-exchange successors to the Bell System, with their collective 80% market share, and the "independent" telephone companies. See pp. 12-13, *supra*. More-

Nor is Section 274 subject to strict scrutiny on the theory that it is "content-based." Cf. BellSouth Pet. 25-26. To the contrary, the statute applies comprehensively to all forms of electronic publishing, whatever the views or content expressed. See S. Rep. No. 367, 103d Cong., 2d Sess. 82 (1994) (explaining that the statute applies "to all content-based information services generally thought of as electronic publishing regardless of their subject matter"). It is true that one must examine whether the information that the BOC proposes to transmit is one of the types of information listed in the statute's definition of "electronic publishing." But that does not render Section 274 a content-based speech restriction. The statutory definition contains Congress's identification of the *industry* to be regulated—"electronic publishing." And because electronic publishing is an industry that provides information, Congress necessarily had to specify the types of information generally thought to be provided by the companies in the relevant market. It is for that reason, and not because of a governmental desire to suppress certain ideas, that the statute applies to "news" or "legal materials," 47 U.S.C. 274(h)(1), but not to "[v]ideo programming or full motion video entertainment on demand." 47 U.S.C. 274(h)(2)(O). The former were seen to be part and parcel of electronic publishing; the latter was not.

Moreover, "[t]he principal inquiry in determining content neutrality * * * is whether the government

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over, BellSouth cannot explain how that distinction could conceivably raise issues under the *First Amendment*, since there is no basis for speculating that the views or ideas transmitted by BOCs would be different from those transmitted by non-BOC telephone companies.

has adopted a regulation of speech because of disagreement with the message it conveys." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989); see *Turner I*, 512 U.S. at 642. Thus, "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791. In other words, "[g]overnment regulation of expressive activity is content neutral so long as it is *justified* without reference to the content of the regulated speech." *Ibid.* (internal quotation marks and citation omitted). Here, Congress enacted Section 274 to "guard against discrimination [and] to prevent cross subsidization" by the BOCs in providing electronic publishing services (H.R. Rep. No. 559, 103d Cong., 2d Sess., Pt. 1, at 25 (1994))—*i.e.*, "to ensur[e] that the regional Bell operating companies do not exploit their monopolies to unfairly disadvantage competitors in the electronic publishing field." 140 Cong. Rec. H5212 (daily ed. June 28, 1994) (statement of Rep. Bryant). As the court of appeals recognized, that purpose "is independent of content and viewpoint." Pet. App. 22a; accord *SBC Communications*, 154 F.3d at 247; see generally *Turner I*, 512 U.S. at 643-652.

b. "A content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner Broad. Sys.* v. *FCC*, 520 U.S. 180, 189 (1997) (*Turner II*). BellSouth contends that, even if intermediate scrutiny applies, there is insufficient evidence that the harms sought to be addressed by Section 274 "are real and that its restriction will in fact alleviate them to a material degree." BellSouth Pet. 26 (quoting *Eden-*

field v. *Fane*, 507 U.S. 761, 770-771 (1993)). That argument is without merit.

Section 274 promotes competition by guarding against the risk that the BOCs might leverage their monopoly power over local telephone lines to the detriment of competition in electronic publishing. As this Court has emphasized, "the Government's interest in eliminating restraints on fair competition is always substantial, even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment." *Turner I*, 512 U.S. at 664. Congress had persuasive evidence that, if left unregulated, the BOCs would likely have the incentive and ability to impede competition and the free flow of information in the electronic publishing industry.

For example, Congress knew from the opinions of the district court administering the consent decree that the BOCs were able to use their monopoly control over local telephone lines to discriminate against competing providers of information services "by providing more favorable access to the local network for their own information services than to the information services provided by competitors," as well as by "subsidiz[ing] the prices of their [information] services with revenues from the local exchange monopol[ies]." *United States* v. *AT&T*, 552 F. Supp. at 189.[10] Congress relied in part on

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[10] In affirming the district court's subsequent approval of the Justice Department's request to lift the information services prohibition, the court of appeals did not determine that removal of the information services restriction was the only possible policy outcome, but found only that the removal request "had substantial factual support and was grounded in reasonable analysis." *United States* v. *Western Elec. Co.*, 993 F.2d 1572, 1581 (D.C. Cir.), cert. denied, 510 U.S. 984 (1993). Indeed, the D.C. Circuit emphasized

the record assembled in those judicial proceedings in formulating Section 274's safeguards.[11] Congress also heard extensive testimony by market participants, including the Newspaper Association of America and the Electronic Publishers Group, concerning the need for temporary statutory protections.[12] This Court "need not put [its] imprimatur on Congress' economic theory in order to validate the reasonableness of its judgment." *Turner II*, 520 U.S. at 208. And Congress is not "obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review." *Id.* at 213 (citation omitted). It is sufficient that, as here, Section 274's "content-neutral regulations * * * [are] grounded on reasonable factual findings supported by

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that "proponents of the entry ban submitted affidavits in its favor" (*ibid.*); that it was not the court's role "to choose among the opposing positions of distinguished economists" (*ibid.*); that the court was not called upon "to determine whether removal of the information services ban is an optimizing move" (*id.* at 1582); and that "[t]he distinguished experts marshalled by the appellants may, in the eyes of an omniscient being, be 'right'" (*ibid.*).

[11] See, *e.g.*, H.R. Rep. No. 559, *supra*, Pt. 1, at 32-34; H.R. Rep. No. 559, *supra*, Pt. 2, at 24-25; see also H.R. Rep. No. 204, *supra*, Pt. 1, at 49; H.R. Rep. No. 203, 104th Cong., 1st Sess., Pt. 1, at 13-14 (1995); see also H.R. Rep. No. 850, *supra*, at 56-58.

[12] See *Communications Law Reform: Hearings Before the Subcomm. on Telecomm. and Fin. of the House Comm. on Commerce*, 104th Cong., 1st Sess. 454 (1995) (testimony of Robert W. Decherd); *S. 1822, The Communications Act of 1994: Hearing Before the Senate Comm. on Commerce, Science and Transp.*, 103d Cong., 2d Sess. 136 (1994) (testimony of Sandra Weis); *id.* at 115 (testimony of Frank Bennack, Jr.); accord *National Communications Infrastructure (Part 3): Hearings Before the Subcomm. on Telecomm. and Fin. of the House Comm. on Energy and Commerce*, 103d Cong., 2d Sess. 5-18 (1994) (testimony of Frank Bennack, Jr.); *id.* at 34-46 (testimony of George M. Perry).

evidence that is substantial for a legislative determination." *Id.* at 224.

Finally, BellSouth maintains (Pet. 28-29) that Congress should have addressed "[t]he dangers of improper cost allocation and discrimination" through "nonstructural safeguards." It is settled, however, that "content-neutral regulations are not 'invalid simply because there is some imaginable alternative that might be less burdensome on speech.'" *Turner II*, 520 U.S. at 217 (citation omitted); *Ward*, 491 U.S. at 797. It is enough that the "regulation promotes a substantial government interest that would be achieved less effectively absent the regulation" and does not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 799 (citation omitted); accord *Turner II*, 520 U.S. at 217-218; *Turner I*, 512 U.S. at 662. As the court of appeals found, "[i]t is at least plausible that structural separation will more effectively meet the perceived anticompetitive threat than would lesser restrictions." Pet. App. 23a. That choice among legislative remedies was for Congress to make.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

BELLSOUTH CORPORATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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REPLY BRIEF FOR PETITIONER

I. Section 274 Violates the Bill of Attainder Clause and the Separation of Powers.

1. The Government does not defend what the Court of Appeals actually held in this case. First, the Court of Appeals held that 47 U.S.C. § 274 could be analyzed "apart from its specific targeting aspect." App. 14a. Only by assuming away this critical aspect of the statute was the Court of Appeals able to conclude that Section 274 "is nothing more than a line-of-business restriction, comparable for example to the Glass-Steagall Act's limitation on the entry of commercial banks into investment banking or to the cross-ownership restrictions on broadcasters upheld in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978)." App. 12a. Under this approach, Congress could single out a particularly disfavored defense contractor, or software company, or firearms manufacturer, and subject that entity — alone and by name — to legislative abuse so long as the same rule *might have been* applied across-the-board to all similarly situated parties. The Government's claim that such line of business restrictions are "a legal commonplace" (Govt. Opp. 10) ignores the fact that these restrictions are invariably *general* prohibitions regulating an open, objectively defined class identified by neutral characteristics (whether a business is a national bank, for example) — not regulating according to a list of names which no one can ever leave and no other person can ever join.

Similarly, the Government makes no serious attempt to defend the Court of Appeals' holding that the "most important" question is whether Section 274 could "reasonably be said to further nonpunitive legislative purposes." App. 13a; *see also id.* at 17a (whether "the distinction drawn by Congress seems . . . understandable without resort to inferences of punitive purposes"). The test, according to the D.C. Circuit, is whether "Congress [can] rationally be said to have pursued nonpunitive purposes in enacting § 274." App. 15a.

The Government cannot deny that this holding is directly contrary to this Court's decisions in *United States v. Brown*, 381 U.S. 437, 456-58 (1965), and *Nixon v. Administrator of General Services*, 433 U.S. 425, 476 n.40 (1977). Virtually any Bill of Attainder can be justified by appeal to a regulatory purpose; indeed, the more extensive the trial by legislature, the more rational the resulting attainder will appear to be. This Court has never held that a form of punishment falling within the "checklist of deprivations and disabilities" that includes line-of-business limitations (*Selective Service System v. Minnesota PIRG*, 468 U.S. 841, 852 (1984); *Nixon*, 433 U.S. at 473-74) can be salvaged by a judicial finding that the statute serves a legitimate regulatory purpose. Instead, this Court has held that "[a] statutory enactment that imposes any of those [checklist] sanctions on named or identifiable individuals would be immediately constitutionally suspect." *Nixon*, 433 U.S. at 473. In both *Nixon* and *Selective Service System*, this Court did not even inquire into "whether the challenged statute [could] be reasonably said to further nonpunitive goals" (*Selective Service System*, 468 U.S. at 854) until it determined that the disabilities imposed by the challenged statute were not among the "forbidden deprivations" contained in the historical checklist. *Nixon*, 433 U.S. at 475; *see also Artway v. Attorney General of New Jersey*, 81 F.3d 1235, 1263 (3d Cir. 1996) (Becker, J.) ("even if some remedial purpose can fully explain the measure," a law is punitive if "a historical analysis shows that the measure has traditionally been regarded as punishment"). The framers were thoroughly familiar with allegedly "regulatory" Bills of Attainder. The anti-Tory laws passed during the Revolution — which the Bill of Attainder clause was adopted to prevent — were justified on just such a basis.[1]

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[1] During the American Revolution, Bills of Attainder were used "with a most unsparing hand." 3 Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1338, at 211 n.3 (1833).

2. Rather than addressing the fundamental constitutional infirmity of the decision below, and despite the decision's breathtaking precedential implications, the Government argues primarily that this case has little "practical significance." Govt. Opp. 9. The Government notes that on Jan. 19, 1999 this Court denied review in *SBC Communications, Inc. v. FCC*, Nos. 98-652 and 98-653, *see* 119 S. Ct. 889, and suggests that "[n]othing has happened in the intervening weeks to make certiorari more appropriate now than it was then." Govt. Opp. 8.

But the denial of certiorari in *SBC* — which the Government admits did not involve the First Amendment question presented here, *see* Govt. Opp. 14 n.7[2] — does not establish whether review should be granted in this case. "The denial of a writ of certiorari imports no expression upon the merits of the case, as the bar has been told many times." *United States v. Carver*, 260 U.S. 482, 490 (1923). This Court has frequently granted

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Each of the thirteen colonies adopted anti-loyalist legislation, typically citing such allegedly regulatory purposes as "public safety." *See* Alison Reppy, *The Spectre of Attainder in New York*, 23 ST. JOHN'S L. REV. 1, 22 (1948). *See also* John Hart Ely, Note, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330, 339 (1962) ("the primary purpose of some pre-Constitution bills of attainder was to prevent certain types of future conduct on the part of the individuals attainted"). For example, an infamous New York loyalty oath requirement of July 3, 1778 recited its purpose "more effectually to prevent the mischiefs arising from the influence and example of persons of equivocal and suspected character." James Westfall Thompson, *Anti-Loyalist Legislation During the American Revolution*, 3 ILL. L. REV. 147, 153 (1908). In 1789, having experienced such legislative excesses firsthand, the framers — unanimously, *see* James Madison, DEBATES IN THE FEDERAL CONSTITUTION OF 1787, at 449 (Hunt & Scott eds. 1920) — moved to ensure that they should never recur.

[2] Notably, the long distance incumbents decline to defend Section 274 under the First Amendment. *See* MCI/AT&T Opp. 1 n.1.

certiorari to resolve an important legal question even in the absence of a circuit conflict and even after denying certiorari on the same issue not long before.[3]

If anything, the Fifth Circuit's decision underscores the need for review here. The Fifth Circuit and the D.C. Circuit disagreed over the meaning of the Bill of Attainder Clause and related separation of powers principles. The D.C. Circuit premised its holding on the assumption that Section 274 could be analyzed "apart from its specific targeting aspect." App. 14a. By contrast, the Fifth Circuit grounded its decision on what it termed a "prophylactic exception" to the Bill of Attainder Clause: "a properly crafted prophylactic measure [can] survive attainder analysis, even where the finding of a propensity for future conduct was based solely on past acts, and the result was a bar from future employment." *SBC Communications, Inc. v. FCC*, 154 F.3d 226, 237 (5th Cir. 1998).

Both the Fifth and D.C. Circuits expressed uncertainty as to the proper construction of the Bill of Attainder Clause. The Fifth Circuit bemoaned that, "[l]ike a Christmas pie," this Court's

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[3] *See, e.g., Eastern Enterprises v. Apfel*, 118 S. Ct. 2131, 2144 n.4 (1998) (granting review and reversing, despite the absence of a circuit conflict and despite the denials of cert. on same issue in 1995, 1996, and 1997); *Cohen v. de la Cruz*, 118 S. Ct. 1212, 1216 (1998) (granting review despite previous denials of cert.); *Bailey v. United States*, 516 U.S. 137, 142 (1995) (same); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (granting review after denials of cert. in *Christophersen v. Allied Signal Corp.*, 939 F.2d 1106 (5th Cir. 1991) (*per curiam*), *cert. denied*, 503 U.S. 912 (1992), and *Turpin v. Merrell Dow Pharmaceuticals, Inc.*, 959 F.2d 1349 (6th Cir.), *cert. denied*, 506 U.S. 826 (1992)). *See also National Credit Union Admin. v. First Nat. Bank & Trust Co.*, 118 S. Ct. 927, 933 & n.2 (1998) (granting cert. despite agreement between circuits, "[b]ecause of the importance of the issues presented"); *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997) (granting review, and reversing, in separation of powers case despite absence of a circuit split).

opinions "provide a little something for every taste." 154 F.3d at 247 n. 30. The court described its analysis as a "sinuous journey" through the "diverse expressions and applications" of the Bill of Attainder Clause in this Court's cases. *Id.* Similarly, the D.C. Circuit in the decision below acknowledged that "it is not clear whether the specificity requirement retains any real bite" (App. 7a) and confessed uncertainty as to the meaning of this Court's decision in *United States v. Brown*, 381 U.S. 437 (1965). *See* App. 8a-9a. Not surprisingly, lengthy and vociferous dissenting opinions were filed both in the Fifth Circuit and in the decision below.

By itself, such overt confusion in two Circuits regarding the proper interpretation of this Court's decisions, accompanied by divergent application of those decisions, would warrant review. When the issue involves a fundamental question about a structural limit to congressional power, the need for certiorari is imperative. *Cf. Clinton v. City of New York*, 118 S. Ct. 2091, 2108-09 (1998) (Kennedy, J., concurring) ("The Constitution's structure requires a stability which transcends the convenience of the moment.").

3. The Government and the long distance incumbents argue that review is unwarranted because Section 274 contains a sunset provision effective Feb. 8, 2000. *See* 47 U.S.C. § 274(g)(2). But if review were granted in this case, it would be set for argument well before Feb. 2000, most likely in Oct. 1999. This Court should not leave unreviewed a demonstrably incorrect decision by a Court of Appeals on an important issue of federal constitutional law simply on the speculation that it would be unable to issue a decision prior to the sunset provision's trigger date. An unconstitutional four-year jail term should not escape this Court's review merely on the Government's conjecture that the victim would be released from prison prior to the issuance of this Court's opinion.

Moreover, the effects of Section 274 will not disappear on Feb. 8, 2000. Section 274(e) creates a private right of action

against the BOCs, enforceable under 47 U.S.C. §§ 206 and 207, for alleged violations of Section 274. Private plaintiffs would no doubt contend that Section 274(g)(2), which provides that Section 274 "shall not apply to conduct occurring after" Feb. 8, 2000, does not extinguish a BOC's liability for damages based on conduct occurring prior to the sunset date. The Government would likely take a similar view in any proceeding to enforce the penal provisions of 47 U.S.C. §§ 501-03.

Any suggestion that BellSouth has slept on its rights (MCI/AT&T Opp. 10 n.7) is offensive and untrue. BellSouth has acted expeditiously at every turn, and the primary reason that this case was not presented earlier to this Court is a series of delays wholly outside of BellSouth's control. Section 274 was signed into law on February 8, 1996, but the FCC took over a year to promulgate its implementing rules. Once the rules were adopted, BellSouth filed its petition for review a mere eight days after a synopsis of the Order was published in the Federal Register. *See* 62 Fed. Reg. 7690 (Feb. 20, 1997). The case was not argued until a year later (Feb. 20, 1998). After the D.C. Circuit's decision issued, BellSouth promptly sought rehearing and filed its petition for certiorari in this Court almost a month before it was due. Indeed, it is ill-fitting for the Solicitor General to plead the passage of time as a reason for denying review, when he sought and received from this Court a two-month extension of time for the filing of the Government's brief in opposition to certiorari.

4. The remainder of the arguments against certiorari are makeweight and largely anticipated in the Petition. The Government argues that Section 274 is a mere structural separation rule. *But see* Petition for Certiorari ("Pet."). at 21-22. Section 274 is a complete ban on the ability of a BOC or its affiliates to provide electronic publishing through its telephone network in its local service area. *See* Pet. at 21-22. It would be as though the WASHINGTON POST were prohibited from publishing except through another member of its corporate

family (say, NEWSWEEK), outside the POST's editorial control. With a one-year grace period (Section 274(g)(1)), Section 274 effectively forced the BOCs to discontinue electronic publishing services that they had been lawfully able to provide for five years prior to 1996, with no evidence of anticompetitive harm.

Respondents half-heartedly defend the "rationality" of targeting the BOCs by name in Section 274. But respondents are wrong on the facts (*see* Pet. at 19-20) and wrong on the law. Even if the distinction drawn by Congress were rational, it would amount to an impermissible trial by legislature. *See Brown*, 381 U.S. at 449 n.23, 450 n.24.

Respondents maintain that collateral benefits in the 1996 Telecommunications Act outweigh any punitive effect of Section 274 on the BOCs. *But see* Pet. at 22 n.13. The suggestion that the BOCs supported the Special Provisions targeting them by name is both untrue[4] and legally irrelevant. *See New York v.*

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[4] The BOCs emphasized that they *opposed* special rules applicable to them alone. Submissions by Laurence Tribe and the American Civil Liberties Union contended that such measures were unconstitutional. *See* H.R. Rep. No. 102-850, 102d Cong., 2d Sess. 88 (1992). The BOCs testified that singling them out would be "wrong, anti-competitive, counterproductive, and anti-consumer." *Communications Law Reform: Hearings before the Subcomm. on Telecomm. and Fin. of the House Comm. on Commerce*, 104th Cong., 1st Sess. 30 (1995) (statement of Edward E. Whitacre, Jr. of SBC); *id.* ("this bill needs to clearly state that all regulatory, legislative, and judicial barriers to entry into all markets are being lifted at the same time"). *See also S. 1822, The Communications Act of 1994: Hearings before the Senate Comm. on Commerce, Science, and Transportation*, 103d Cong., 2d Sess. 144 (1994) (testimony of James Cullen of Bell Atlantic) (safeguards "are meant to apply to local exchange providers, whether they are independents or RBOCs"). BOC statements in favor of the legislation were simply recognitions that the restrictions imposed by Congress on the BOCs could have been worse. *See* Hearings on H.R. 3626, *Antitrust and Communications Reform Act of 1993*, Subcomm. on Economic and Commercial Law of the House

United States, 505 U.S. 144, 183 (1992) ("That a party collaborated with others in seeking legislation has never been understood to estop the party from challenging that legislation in subsequent litigation.").

II. Section 274 Violates the First Amendment.

1. The Government argues that Section 274 is not subject to strict scrutiny as a speaker-specific, content-based ban on speech because Congress did not target the BOCs due to "any particular message they might convey." Govt. Br. 15. But an inquiry into motive is misplaced. In *Cincinnati v. Discovery Network*, 507 U.S. 410 (1993), for example, this Court acknowledged that "there is no evidence that the city has acted with animus toward the ideas contained within respondents' publications." *Id.* at 429. Nonetheless, this Court found the city's "mens rea" irrelevant. *Id.*; *see also Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 117 (1991); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983). Nor can Section 274 be justified on the basis of alleged "bottleneck monopoly power," Govt. Opp. 15, because the statute was not written to apply to all LECs with such alleged power. *See* Pet. 25 n.15.

The Government attempts to repackage Section 274 as a "market-based" restriction, but it is forced to admit that "one must examine whether the information that the BOC proposes to

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Comm. on the Judiciary, 103d Cong., 2d Sess. 152 (1994) ("While H.R. 3626 may eventually remove barriers between consumers and new products and services, it unnecessarily delays this process. In addition, it removes some Bell information services freedoms already gained through the court of appeals. It places Bell manufacturing operations under Department of Justice oversight, *unlike any other American company*. But given the choice between these compromises and continued stalemate, we will take the compromises . . . .") (statement of Edward E. Whitacre, Jr.) (emphasis added).

transmit is one of the types of information listed in the statute's definition of 'electronic publishing.'" Govt. Opp. 16. Thus, the ban in Section 274 is content-based "by any commonsense understanding of the term," *Discovery Network*, 507 U.S. at 429, because it operates according to the substance of what the speaker wishes to say. *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230, 232 (1987) (market-based definition was content-based because "enforcement authorities must necessarily examine the content of the message that is conveyed") (citation omitted).

2. The Government maintains that Section 274 can survive intermediate First Amendment scrutiny. But the Government cannot supply anything but "mere speculation and conjecture" to support that claim. *Edenfield v. Fane*, 507 U.S. 761, 770 (1993). The only *evidence* in the record proves that there were no signs of anticompetitive harm in the electronic publishing market prior to the entry of the AT&T consent decree. *See United States v. Western Elec. Co.*, 900 F.2d 283, 289, 307 (D.C. Cir.) (*per curiam*), *cert. denied*, 498 U.S. 911 (1990). The information services restriction was lifted in 1991 based on a well-documented showing by the BOCs, DOJ, and the FCC that BOC entry posed no substantial competitive risks and indeed would *benefit* consumers. This conclusion was supported by the National Telecommunications and Information Administration, the National Association of Regulatory Commissioners, numerous state commissions, consumer and public interest groups, and expert economists, including two Nobel laureates. *See* Pet. 6. The Court of Appeals, in approving removal of the restriction, held that the evidence supporting removal was so strong "that any district court rejection of the proposed modification would have been reversible error" and any findings that "contradict[ed] the Department's conclusions [would have been] clearly erroneous." *United States v. Western Electric Co.*, 993 F.3d 1572, 1578 (D.C. Cir.), *cert. denied*, 510 U.S. 985 (1993).

The Government offers only two slender reeds to support Section 274: the 1982 speculation of Judge Harold Greene that the information services ban might protect against anticompetitive practices, and self-serving testimony by would-be competitors of the BOCs urging Congress to exclude the BOCs from the market. Govt. Opp. 18-19. This is no evidence at all. Judge Greene's conjecture was based on theory, not factual findings; was offered prior to the FCC's development of an elaborate system of regulatory safeguards; and was disproven by subsequent events, as the D.C. Circuit held in 1993. The congressional testimony cited by the Government is meaningless in light of Congress' own finding (studiously ignored by the Government) that independent information service providers were "thriving" in 1994, three years *after* the BOCs were permitted to enter that market. H.R. Rep. No. 103-559(II), 103d Cong., 2d Sess. 25 (1994).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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